

No. _____

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U.S. DISTRICT COURT
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IN THE

JOSEPH F. SPANIOL, JR.
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1990

JAMES THOMAS SLOAN, JR., FREDRICK J. FARRER
and GARY C. NEWTON,

Petitioners

-vs-

G & G MANUFACTURING INC., a Nebraska corporation,
Respondent

On Petition of Writ of Certiorari to the United States Court of
Appeals for the Sixth Circuit

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT
AND APPENDIX**

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QUESTIONS PRESENTED FOR REVIEW

IS A COMPLAINT SUFFICIENTLY WELL-GROUNDED IN FACT TO AVOID IMPOSITION OF RULE 11 SANCTIONS IF THE COURT DETERMINES IN RULING ON A RULE 56 MOTION THAT THERE IS A GENUINE ISSUE AS TO MATERIAL FACT REQUIRING SUBMISSION TO A JURY?

The Courts below answered: "NO."

Petitioner answers: "YES."

Respondent answers: "NO."

MAY RULE 11 SANCTIONS BE IMPOSED UPON LAWYERS WHO HAVE NOT SIGNED A PLEADING, MOTION OR OTHER PAPER THAT VIOLATES THE RULE?

The Courts below implicitly answered: "YES."

Petitioner answers: "NO."

Respondent presumably answers: "YES."

**PARTIES TO THE PROCEEDING AND
RULE 29.1 STATEMENT**

Plaintiffs in the District Court were Harold Mann and Jean Mann. Defendants in the District Court were Hutchinson Division, Lear Siegler, Inc., a Delaware corporation and G & G Manufacturing, Inc. a Nebraska corporation.

The parties to the proceeding in the United States Court of Appeals for the Sixth Circuit were James Thomas Sloan, Jr., Fredrick J. Farrer, Gary C. Newton; Sloan, Benefiel, Farrer, Newton & Glista; and Sloan, Newton & Stevens, Appellants, and G & G Manufacturing, Inc., a Nebraska corporation, Appellee.

Petitioners are not corporations and there is no parent or subsidiary company to be listed pursuant to Rule 29.1.

DATED: August 21, 1990

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JAMES THOMAS SLOAN, JR., FREDRICK J. FARRER and GARY C.
NEWTON

Petitioners,

-vs-

G & G MANUFACTURING, INC., a Nebraska Corporation,
Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

Petitioners, JAMES THOMAS SLOAN, JR., FREDRICK J. FARRER and GARY C. NEWTON pray for issuance of a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered on April 12, 1990, with rehearing denied May 24, 1990.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit is an yet unpublished opinion entered on April 12, 1990. A copy of the

Opinion is included in the Appendix. (A 1)¹ The Sixth Circuit's Order denying rehearing was entered May 24, 1990. A copy of the Order is in the Appendix. (A 18)

The Opinion of the Sixth Circuit affirmed in part and reversed in part an Order of the United States District Court for the Western District of Michigan entered in its case number K 84-71-CA4 on May 8, 1988. A copy is in the Appendix (A 19) as is a transcript of the trial court's oral opinion on sanctions. (A21)

CONCISE STATEMENT OF JURISDICTION

The Supreme Court has jurisdiction to hear this case on certiorari under 28 USC §1254(1). A written Opinion was issued by the United States Court of appeals for the Sixth Circuit on April 12, 1990. On April 25, 1990 Petitioners filed a timely petition under FRAP 40 for rehearing with a suggestion for rehearing in banc. The petition for rehearing was denied on May 24, 1990.

REGULATIONS INVOLVED IN THE CASE

Federal Rule of Civil Procedure 11 and Federal Rule of Civil Procedure 56 were primarily at issue below. Western District of Michigan Rule 19(e), Western District of Michigan Rule 42 and Canon 7 of the Model Code of Professional Responsibility of the American Bar Association, 1983 and state statutes MCL 600.2945 & 2949; MSA 27A.2945 & 2949 were involved. All referenced rules, regulations and statutes are set forth in the appendix. (A 27-39)

CONCISE STATEMENT OF THE CASE

Plaintiffs Harold and Jean Mann ("plaintiffs" or "the Manns") filed a diversity jurisdiction action pursuant to 28 USC §1332 on February 29, 1984. Plaintiffs product liability suit sought recovery for personal injuries and loss of consortium resulting from a farming accident. Under Michigan law, all theories of product liability have been combined into a single cause of action, to which the doctrine of pure comparative negligence

¹ References to the Appendix are "A" followed by the page number.

applies. MCL 600.2945 & 2949; MSA 27A.2945 & 2949. (A 39)

Harold Mann's leg had been mutilated by a grain auger, a machine used to lift grain from ground level to the loading door of a silo or grain storage bin. The auger had markings on it that indicated it was manufactured by the Hutchinson Division of Lear Siegler, Inc. a Delaware corporation ("Hutchinson"). The auger had a guard, or the remnant of a guard, produced by G & G Manufacturing, Inc., a Nebraska corporation ("G & G"). The guard was marked to show it was G & G's product.

Plaintiffs initially sued Hutchinson on a variety of theories, including failure to guard the auger properly, failure to warn, negligence and breach of implied warranties of merchantability and fitness. Early discovery requests directed to Hutchinson led plaintiffs' counsel to believe that the shaft and guard of the Hutchinson auger may have been supplied by G & G.

Plaintiffs' interrogatory asked (A 40):

"Did the defendant, Hutchinson Division of Lear Siegler, Inc. manufacture and produce the 'Hutchinson Portable Auger' in question? (Please see photograph of the Hutchinson Portable Auger attached.)"

Hutchinson answered by saying:

"The photographs appear to show an auger manufactured by Hutchinson."

Hutchinson's answers to interrogatories said that the auger "in question" was manufactured on or about April 18, 1980 (A 40), but that the photograph showed a drive shaft "that was not furnished by this defendant. It is obviously furnished by others." (A 41)

Hutchinson indicated (A 43) that the only entity that had ever provided shafts for its augers was G & G. It also asserted that the shaft shown in the photograph was different from "defendant's [Hutchinson's] drive shafts". Hutchinson did not respond to these interrogatories about who supplied the guard. (A 41)

The farm implement seller and mechanic who sold the auger said he could not be certain whether the pictures of the auger he was shown were Hutchinson's auger or some other manufacturer's, because all augers were

so similar. Mr. Slabaugh testified on May 6, 1985 that it was "hard to tell" if the shaft shown in the picture of the auger in question was the type produced and sold by Hutchinson. He said "it looks like the type, but it's hard to tell. It's in pieces." (A 98)

Although Hutchinson's expert, Mr. Benninga, said that their shafts were distinctive because of a pin mechanism that prevented them from pulling apart, Mr. Slabaugh, who sold Hutchinson shafts and was familiar with them, said that he was not aware of any such mechanism and that he would have a "tendency to dispute" Hutchinson's expert "because I own a Hutchinson Auger myself, and mine does pull apart." (A 100)

Three months before the statute of limitations on a claim against G & G would have expired, plaintiffs filed an amended complaint (A 44-53) alleging that G & G manufactured the drive shaft and guard of the auger. Various product liability theories were advanced, including failure to provide a guard designed to last as long as the drive shaft, failure to warn of dangers associated with the guard, breach of implied warranties of fitness, safety and merchantability, etc. The subparts of Count II, paragraph 10 of the amended complaint (A 50-52) particularized plaintiffs' claims regarding the insufficiency of G & G's plastic guard, including its propensity to environmental degradation.

From the beginning, G & G's counsel threatened to seek actual costs and attorneys fees under Rule 11, and a variety of other statutes and court rules, in the event G & G prevailed. (A 4, 24) Plaintiffs' discovery requests regarding information about G & G drive shafts and guards, their design, manufacturer, etc., were resisted and a number of motions to compel discovery were held, with mixed results. G & G denied that it made the drive shaft, but never disputed the fact that the guard on the auger which injured Mr. Mann was one it had manufactured. (A 10-11, 79)

Defense experts, including G & G employees, said that the drive shaft had not been manufactured by G & G, although no documentary evidence was ever produced to show who did manufacture the shaft. G & G's employees testified that the auger shaft was a Rockwell Standard and that the PTO shaft was manufactured by Rexnord. G & G responded to the complaint by denying that it manufactured the shaft, claiming that if the guard had been made by G & G, it had been modified after it was sold and that plaintiff had "voluntarily and unreasonably proceeded to encounter a known risk" that, G & G alleged, was the sole proximate cause of his injuries. (A 54-57)

G & G moved for summary judgment under Rule 56, asserting that there was no genuine issue as to any material fact. In response to the motion, plaintiffs conceded that they had no proof to counter defendants' witnesses' say-so that the drive shaft had not been manufactured by G & G. At page two of their brief in opposition to the motion for summary judgment (A 59), plaintiffs said:

"Plaintiff[s] cannot, at this time, show that Defendant G & G had anything to do with the manufacture of the drive shaft. This is of little significance, however, since the primary cause of this accident is the defective nature of the guard which is supposed to guard persons from the drive shaft."

Plaintiffs pursued the claim asserted in the amended complaint that the G & G guard incorporated onto the auger was inadequate and unreasonably dangerous because it was susceptible to "misuse," composed of a material that degraded with use, could be put in place on the auger in a partially assembled condition which afforded less than complete protection and lacked any warning or instruction on how it should be used safely.

Plaintiffs' experts supported their claim that the guard was defective. Dr. Paul Trojan, a Professor of Materials and Metallurgical Engineering at the University of Michigan, was very critical of the plastic composition of the guard. He said that it was obvious that the guard had degraded (A 106), that surface degradation affected the structural integrity of the guard (A 107) and that the kind of plastic used wasn't "any good" as a material for use in machine guards for power take-off shafts. Dr. Trojan said the material "didn't perform the way that it should." (A 107).

Dr. Trojan disputed the testimony of G & G employees about the configuration of Hutchinson shafts. He thought the auger in question might have had a Hutchinson shaft, although he couldn't tell for certain. (A 102-105).

More importantly, Dr. Trojan who was of the professional opinion that the guard played a role in the injury. (A 108).

Plaintiffs had obtained the services of Dr. Lee R. Nylander, a PhD chemist and vice president of a metallurgy and chemical consulting firm. He found that the plastic of the guard was degraded. (A 109-110). He determined that the guard had lost between 55% and 58% of its impact resistance. (A 110). He felt the guard was "certainly not suitable for

prolonged outdoor exposure." (A 111)

Plaintiffs also relied on the expert testimony of Dr. Wesley Buchele, a safety expert with a doctoral degree in agricultural engineering and over 40 years in dealing with farm machinery safety. He thought that the G & G guard was made of a material not suitable for PTO shaft shields because of its short life span and its tendency to be degraded in normal use. (A 116). Dr. Buchele also thought that in light of the tendency of the separate components of the machine to be separated in normal farm use, that warnings should be put on each part and that warnings should be given concerning the lack of effectiveness of the guard after surface degradation. (A 115-116). Dr. Buchele believed that the lack of a suitable guard on the shaft did have a causal connection to Mr. Manns' injury (A 117-118) Dr. Buchele's analysis was that when Mr. Mann fell or brushed against the shaft "that the shaft then broke, the end of the shield broke, and his clothing caught on the shaft and began being wrapped up by the shaft." (A 117-118). He did not agree with opinions expressed by G & G experts that Mr. Manns' clothing initially contacted a burr on the portion of the shaft that did not have a guard. (A 118). He explained further that in his opinion Mr. Mann brushed against or fell against the guard and the guard split. "Because the guard was rotating at the time the clothing - as the guard split, the clothing - the guard caught the clothing, and the shaft caught the clothing inside the split and started then winding up the clothing."

Before commencing suit, plaintiffs had conducted an extensive investigation. Photographs had been taken, witness statements had been obtained and at least three experts had been asked to offer an opinion concerning the design and safety of the machine.

The District Court Judge, the Honorable Benjamin Gibson, denied G & G's motion for summary disposition saying:

"The court is of the opinion that with respect to the matter of Defendant G & G, there is a factual dispute that would preclude the granting of a summary judgment motion; and, therefore, the motion for summary judgment is denied." (A 62)

The Court described the factual dispute as follows:

"With respect to the question of the liability of G & G, Inc., there

is a factual dispute . . . with regard to the guard in question. There is some evidence which tends to indicate that G & G is connected with or did manufacture the guard in question. There is a theory that the guard which remained on the shaft deteriorated because of the elements and, as a consequence, was in some way responsible for this accident. There is also a theory that the design of the shaft is - the design of the guard in question is such that it is able to separate; and, by separating, that exposed the shaft which may have been the situs of the accident." (A 62)

The case was mediated under the Western District's Local Rule 42.² (A 30-37) The mediation panel of three lawyers from the Western District of Michigan unanimously evaluated Plaintiff's claim against G & G at \$37,500. (A 69) The claim against Defendant Hutchinson was evaluated at zero dollars. G & G found this evaluation acceptable. Under the local rule, if all parties accept a mediation evaluation, a judgment is entered on the valuation and the case is over. Under WD Mich Rule 42(e)(4) "the evaluation shall include all fees, costs and interests." Acceptance of the evaluation by all parties would have precluded a claim for fees, costs or interest under Rule 11 or any other statute or rule.

Plaintiffs rejected the evaluation initially. (A 65) On April 24, 1987, fifteen days after Judge Gibson denied G & G's motion for summary judgment, plaintiffs attempted to withdraw their rejection of the mediation. (A 66) However on June 24, 1987, Magistrate Brenneman granted G & G's motion to strike the notice of withdrawal. (A 70)

In opposing plaintiffs' effort to withdraw their mediation rejection, G & G argued that substantial work had been done in discovery since mediation and that "this additional activity has done substantial damage to plaintiffs' already weak liability situation." (A 68) G & G argued that:

"The mediation panel's decision would undoubtedly have resulted in a lower award, if any of [sic] all, had the most recent liability information been available." (A 68)

² The provisions for sanctions under this local rule were later vacated by *Tiedel v Northwestern Michigan College*, 865 F2d 88 (6th Cir. 1988) which held the provisions for sanctions violated the attorney fee statute.

On August 14, 1987, the case was reassigned to Judge Robert Holmes Bell. On December 30, 1987, Plaintiffs moved for a voluntary dismissal under Rule 41, with prejudice. (A 72) The motion was granted on January 12, 1988. The question of sanctions under Rule 11 was reserved. (A 75)

On February 19, 1988, G & G filed its motion (A 77-84) seeking monetary sanctions for the total amount of attorney fees and costs incurred in the defense of the action, including all costs and expenses incurred before the ruling on the motion for summary judgment. G & G said that the facts available to Plaintiffs and their counsel at the time they moved for voluntary dismissal under Rule 41 were essentially the same facts known to them at the time the amended complaint was filed and that it should never have been filed. At oral argument on the motion, they alleged that

"plaintiffs had done a substantial amount of inquiry before bringing G & G into this case and knew that they had a weak case and nothing that happened thereafter made it any better." (A 22)

In arguing in favor of sanctions, G & G's counsel argued that the shaft was effectively unguarded because

"the only thing on the shaft was a broken-up piece severely degraded by sunlight and so forth on one end of the telescopic section. One telescopic section was totally gone, including the races, the bearings, everything was gone. What's left is this piece of plastic, about a half or a third of what was at one time one end of a guard... [T]here was no way that what was left could ever possibly function as a guard." (A 23)

Although it had been plaintiff's theory that the injury occurred in part because the guard manufactured by G & G deteriorated badly through use and exposure to the elements which should have been reasonably expected, making the guard useless as protection for people using any auger on which it might be placed, and that the guard was subject to foreseeable misuse that G & G should have designed against (including the likelihood that only part of it would actually be used, given its two part design and lack of instructions), Judge Bell granted Rule 11 sanctions, saying that the complaint was not well-grounded in fact. Judge Bell also

said:

"nor is this Court of a mind to believe that a reasonable inquiry would conclude that G & G manufactured the shaft or that they manufactured a guard which had any plausible connection with the injury." (A 24)

G & G admitted production of the guard, but denied culpability. Judge Bell said that the case was "distinguishable from 99.9 percent of other tort personal injury cases" where the manufacturer admitted production of the product at issue, but denied culpability. (A 24) Judge Bell found that plaintiff's injury was caused by contact with the shaft and that "the injury was not really related to the guard" designed to prevent contact with the shaft, even though plaintiffs' experts disputed this factual conclusion. (A 25)

Judge Bell further held that the phrase "well grounded in fact" found in Rule 11 means that there must be "a factual predicate that could be given to the jury." (A 25) Despite Judge Gibson's denial of summary judgment on those very issues, Judge Bell found that there was nothing that could have been sent to a jury and that costs were appropriate. He ordered \$40,487.61 in sanctions against each attorney who signed any pleading or appeared at any proceeding on behalf of plaintiffs. (A 26)

Petitioners appealed to the United States Court of Appeals for the Sixth Circuit. The Sixth Circuit's opinion concentrated on the fact that G & G's experts said that it did not manufacture the shaft and that plaintiff admitted he knew the guard was incomplete and, therefore, the auger was dangerous. The court emphasized that at the time the amended complaint was filed, plaintiffs' counsel did not have any direct proof that G & G manufactured the shaft. It made no mention of evidence available to plaintiffs' counsel that disputed G & G's claim that the shaft had purportedly distinguishing it from those made by G & G. The court did not hold that Judge Gibson was incorrect in deciding that Plaintiffs had a viable theory on which to pursue G & G with respect to the deficiencies of the guard. It made no mention of Michigan law that plaintiff's negligence would serve only to reduce his recovery, not bar his claim. It made no mention of Michigan law requiring manufacturers to anticipate and design against foreseeable misuse of their products.

There was never any suggestion by G & G's counsel nor any finding by

the courts below that Judge Gibson's decision on the Rule 56 motion was based on any misrepresentation or other misconduct of plaintiffs' counsel. The Rule 11 decisions of the courts below were premised on the assumption that the facts available to all, including plaintiffs' counsel and the court, were insufficient to provide a factual predicate for pursuit of a claim against G & G. G & G asked for attorney fees received "between the time plaintiffs served G & G with a summons and amended complaint on September 5, 1985 and the filing of the motion for voluntary dismissal on December 30, 1987." (A 86-87) It got all it asked for. Plaintiffs' counsel were assessed the entire cost of defending the action, including the claims related to the summary judgment motion they won.

The Sixth Circuit upheld the decision to sanction all lawyers for plaintiffs without regard to whether they had signed any documents, but remanded for recalculation of the awards so as to impose "the least severe sanction that is likely to deter . . ." (A 15) It reversed the award of sanctions against the law firms based on *Pavelic & LeFlore v Marvel Entertainment Group*, ___ US ___, 110 S Ct 456, 107 L Ed2d 438 (1989) and denied a petition for rehearing and a suggestion for rehearing in banc. (A 18) This petition follows.

ARGUMENT

I. LAWYERS SHOULD NOT BE SANCTIONED UNDER RULE 11 FOR BRINGING CLAIMS WHICH PRESENT FACTUAL ISSUES THAT SHOULD BE SUBMITTED TO A JURY.

A. The petition presents an issue which should be resolved by this court.

If the decision in this case is permitted to stand, a factual record which presents genuine issues of material fact substantial enough to survive a Rule 56 motion may, if the claim is abandoned or lost at trial, be later regarded as not sufficiently "well grounded in fact" to avoid the imposition of sanctions under Rule 11. Implicit in the lower courts' decisions is an interpretation of Rule 11 and Rule 56 that holds that a "weak" claim is not "well grounded in fact" even if it presents a "genuine issue as to any material fact" sufficient to preclude the party opposing the claim from obtaining judgment as a matter of law, if the claim is later abandoned or

lost at trial.

It is well established under the decisions of this court that a litigant has a right to have his or her claims determined by a jury if reasonable jurors could properly find a verdict for the litigant. *Anderson v Liberty Lobby, Inc*, 477 US 242, 251, 91 L Ed2d 202, 106 S Ct 2505, (1986) held that:

"Summary judgment should be granted where the evidence is such that it 'would require a directed verdict for the moving party.' And we have noted that the 'genuine issue' summary judgment standard is 'very close' to the 'reasonable jury' directed verdict standard." (Citation omitted).

The directed verdict standard permits cases to go to a jury if the jury could fairly find for the plaintiff. A plaintiff who has a chance of winning, is entitled to a trial. See Wright & Miller, Federal Practice and Procedure: 2524.

The district court's denial of summary judgment to G & G in this case was, in effect, a decision that plaintiffs' evidence was substantial enough that reasonable jurors could return a judgment for plaintiffs on the evidence G & G now says was so insubstantial as to make the claim not "well grounded in fact."

Under the rule adopted by the courts below in this case, a plaintiff, or counsel for a plaintiff, who has a chance of winning and who is entitled to have his claim determined by a jury, can be forced to bear the entire cost of the litigation for the opposing party if he does not successfully proceed with the claim. The Sixth Circuit held that there were "two distinct approaches employed by district courts in the disposition of Rule 56 and Rule 11 motions." (A 11). The court noted that in considering a Rule 56 motion, "the district court views the evidence in the light most favorable to the non-moving party. The district court does not weigh the evidence to 'determine the truth of the matter, but to determine whether there is a genuine issue for trial.'" (A 12) (Citations omitted).

The Sixth Circuit went on to say that in deciding a Rule 11 motion for sanctions:

"The district court then weighs the evidence to determine if counsel's pleadings, motions or papers are well-grounded in fact or warranted by existing law. Given the significant differences

between these two approaches, it is not surprising that a district court's ruling on a Rule 56 motion for summary judgment need not determine the outcome of the district court's ruling on a Rule 11 motion for sanctions." (A 12) (Citations omitted).

In support of the proposition that the outcome of a Rule 56 motion should not determine the outcome of a Rule 11 motion, the court cited *Kamen v American Telephone & Telegraph Co*, 791 F2d 1006, 1014 (2d Cir 1986). That case was hardly support for the new approach to the interrelationship between Rule 11 and Rule 56 announced by the Sixth Circuit. Kamen held sanctions to be inappropriate. Plaintiffs' counsel had sought key information within the defendant's control which they had declined to provide. Based on information received from client, suit was filed and discovery was initiated to obtain the key information. The district court dismissed the action, using, in the Court of Appeals' language, Rule 11 "as a springboard to decide the Rule 12b motion..." Apparently the district court held that because plaintiff's counsel could not prove its case at the time the motion was filed, it ought to be dismissed. The Court of Appeals flatly rejected that approach and said:

"[J]ust as summary judgment or a 12b motion cannot be bootstrapped onto a finding of Rule 11 violation, an improper grant of dismissal cannot be the basis for Rule 11 sanctions."

The decisions below stood *Kamen* on its head. *Kamen* held that Rule 11 sanctions were not necessarily appropriate when plaintiff's counsel does not have enough admissible evidence in hand at the time of filing to survive a motion to dismiss. In this case both lower courts held that plaintiffs' counsel should be sanctioned even though they did have enough evidence to survive summary judgment.

The Sixth Circuit's decision conflicted with its own holding in *Mihalik v Pro Arts, Inc*, 851 F2d 790, 794 (6th Cir 1988), which held that it would be "highly unusual and almost certainly inappropriate to impose Rule 11 sanctions against" a party pursuing a claim that the district court would permit to go to trial.

Mihalik was a wrongful discharge suit. Defendant Trikilis claimed he had good cause to discharge plaintiffs. The case was set for trial, but a week before the trial was scheduled to begin, plaintiffs moved for a

voluntary dismissal. In upholding the denial of Rule 11 sanctions in favor of Trikilis, the Court of Appeals said:

"There is another, more fundamental flaw in Trikilis' reasoning. He contends that because the plaintiffs and their attorneys knew or should have known that he had a plausible reason for firing the three employees, the case should not have been brought in the first place. The gist of his argument is that, where a plaintiff or his attorney knows that the defendant has a strong, and possibly winning defense, they will be sanctioned if they file a complaint. Again, Trikilis misunderstands Rule 11.

[T]he test for the imposition of Rule 11 sanctions is whether the alleged misconduct was reasonable under the circumstances. It is not per se unreasonable to initiate a law suit and pursue a possible claim where the defendant may have a strong defense. Upon reviewing the record, we conclude that it was not unreasonable for the plaintiffs and their attorneys to bring this action. If their claims were so frivolous, we find it remarkable that the district court would allow the case to go to trial. Obviously, the court believed that a trial was necessary in order to determine which side had the superior position." 851 F2d at 794.

This view of the interrelationship between Rule 11 and Rule 56 is implicit in other reported decisions. In *Bush Development Corp v Harbour Place Associates*, 632 F Supp 1359, 1369 (ED Va 1986) the court denied Rule 11 sanctions "in view of the Court's denial of defendants' motion to dismiss and motion for summary judgment . . ."

In *Warnaco, Inc v Farkas*, 664 F Supp 738, 744 (SD NY 1987) aff'd in part 872 F2d 539 (2d Cir 1989) the court held that:

"Because the defendant's defenses properly may be tested only at trial, there is no basis for concluding at this stage that by asserting them he violated Rule 11."

In *Great Hawaiian Financial Corp v Aiu*, 863 F2d 617, 622 (9th Cir 1988) the court reversed a summary judgment in favor of defendants. It also reversed an order sanctioning the appellant for filing a frivolous

motion for reconsideration, saying that the arguments raised in the motion "were the same as those that now persuade us to reverse the district court's summary judgment."

The decisions below conflicted with the rule announced in *Greenberg v Hilton International Co.*, 870 F2d 926, 937 remanded on rehearing 875 F2d 39 (2nd Cir 1989) where the court held:

"We believe that counsel may not be sanctioned under Rule 11 for failing to withdraw a claim based on papers that have previously survived a motion for dismissal or for summary judgment so long as:

- (i) the defeat of that motion was not obtained by misleading the court;
- (ii) the adversary has not attempted through some means on the record to obtain withdrawal of that claim based on a change or clarification of existing law; and
- (iii) the claim has not been repeated in papers filed after the change or clarification of the law."

Implicit in all these holdings is the presumption that attorneys are justified in pursuing claims strong enough to survive motions for summary judgment. The decision in this case conflicts with *Greenberg v Hilton International Co.*, *supra*, and was so at odds with the weight of authority, including the Sixth Circuit's own rule as announced in *Mihalik v Pro Arts, Inc.*, 851 F2d 790, 794 (6th Cir 1988), so as to constitute a radical departure from the accepted and usual course of judicial proceedings, calling for the exercise of this court's power of supervision. Unless corrected, this decision will create a subclass of cases to which the so-called American rule on assessment of attorney fees and costs of litigation would not apply. District courts would be free to impose the entire cost of litigation against a party with a claim or defense that only a jury could decide, if the court determined with the exercise of hindsight that the chances of prevailing were not strong enough in the court's mind to earn the appellation "well grounded in fact."

There are few appellate decisions on this issue. The reported decisions

that can be found hold that absent special circumstances not found in this case, Rule 11 sanctions are not appropriate for pursuing claims that present jury questions. The Court of Appeals has decided an important question of federal law, to wit: the interrelation of Rule 11 and Rule 56, which has not been, but should be, settled by this court.

B. The issue presented is of critical importance to practicing lawyers.

There are thousands of reported decisions on Rule 56. Rule 56 presents a clear standard in almost all cases. Counsel diligently seeking to fulfill their obligation under Rule 11 are ordinarily able to determine in advance whether they will be able to bring a claim that can survive a Rule 56 motion. Lawyers know that if they cannot back up the factual claims made in the complaint they will, at a minimum, see the claim dismissed pursuant to Rule 56. Before the decisions in this case, they also knew, based on well established authority, that even claims lost at trial or dismissed on motion pursuant to Rule 56 might be found to be sufficiently well grounded in fact so as to avoid sanctions.

Gaiardo v Ethyl Corp, 835 F2d 479, 483 (3d Cir 1987) held:

"Litigants misuse the Rule [11] when sanctions are sought against a party or counsel whose only sin was being on the unsuccessful side of a ruling or judgment. Restated, Rule 11 sanctions awarding counsel fees do not automatically or usually follow an adverse judgment or ruling. Substantially more is required."

Chard v State Farm Fire & Casualty Co, 126 FRD 654 (ND Miss 1989) denied Rule 11 sanctions after defendant prevailed on a trial for fire insurance proceeds where the insurer defended on a claim that plaintiffs had committed arson. Relying on *National Association of Government Employees v National Federation of Federal Employees*, 844 F2d 216, 222 (5th Cir 1988) the court held that:

"Rule 11 'does not permit the imposition of sanctions simply for bringing a meritless law suit, without any finding that a party or his lawyer signed a paper in violation of the rule.'

National Association of Government Employees, *supra*, held:

"The district court did not suggest that the Association or its counsel had signed any paper without complying with the Rule 11 or had failed to investigate prior to filing the complaint. Instead, the court referred to the Association's conduct in bringing and prosecuting a meritless lawsuit. As we pointed out in *Thomas [v Capital Security Services, Inc*, 836 F2d 866 (5th Cir 1988) (en banc)], however, Rule 11 focuses on an attorney's obligation 'at the time a 'pleading, motion or other paper' is signed,' and sanctions 'should not amount to an 'accumulation of all perceived misconduct, from filing through trial,' resulting in an 'single, post-judgment retribution in the form of a massive sanctions award.' Rule 11, therefore, does not permit the imposition of sanctions simply for bringing a meritless lawsuit, without any finding that a party or his lawyer's signed a paper in violation of the Rule."

These cases are rational. They provide a basis for determining "the accepted and usual course of judicial proceedings." Before the decisions in this case, parties seeking sanctions had to show more than that their opponents lost a motion for summary judgment. After this case, counsel seeking to avoid sanctions will have to show more than that they fairly and successfully resisted a motion for summary judgment.

If the rule in this case is permitted to stand, lawyers will have little way of knowing whether their claims will be deemed "strong" enough by the trial judge to avoid imposition of sanctions, even if they are confident that the claims present genuine issues of material facts sufficient to enable them to reach a jury and, perhaps, prevail. Instead of asking "can I win" when evaluating a case before filing or proceeding, plaintiffs' counsel will have to determine an answer to the question "will I be sanctioned on a winnable claim if I am unfortunate enough to lose?"

In *McMahon v Shearson/American Express, Inc*, 896 F2d 17, 22 (2nd Cir 1990) the court said that Rule 11 "does not license the district court to sanction any action by an attorney or party that it disapproves of." This is a sensible rule and fairly reflects the standard of practice in district courts. The decision in this case is contrary to that rule. Judges will now be permitted to sanction attorneys for filing pleadings which are meritorious enough to proceed to trial, but meet with the disfavor of the district judge

to whom the case was assigned.

Petitioners believe the decisions below were sufficiently at odds with other reported decisions so as to constitute a radical departure from the accepted and usual course of judicial proceedings. The decisions dramatically frame an important question of federal law which has not been settled by this court, i.e. the relation between Rule 11's requirement that pleadings be "well grounded in fact" and Rule 56's requirement that summary judgment be denied if the pleadings, depositions, answers to interrogatories, admissions on file, together with the affidavit show the existence of a "genuine issue as to any material fact."

C. This case presents an appropriate vehicle for resolution of the issues presented.

In denying defendant G & G summary judgment, Judge Gibson decided that material issues of fact precluded entry of judgment. He did not deny the motion because discovery was incomplete, although he expressly reserved the right to consider a motion for directed verdict made after he heard the evidence at trial. Voluminous discovery had been conducted and Judge Gibson had the opportunity to review a number of pleadings and discovery materials. He also granted a motion for a protective order. He knew there would be no more discovery on these issues.

Judge Gibson did not deny the motion for summary judgment because he thought it was premature or that more discovery should have been done. That makes this case distinguishable from cases like *Jennings v Joshua Independent School District*, 869 F2d 870, 876-877 opinion superceded 877 F2d 313 (5th Cir 1989), where summary judgment was denied because of the failure of the parties to submit any evidence on a key question thought to be in issue. Judge Gibson would have permitted the case to go to trial based on plaintiffs' claims that the guard was defective.

It has not been suggested that plaintiffs avoided summary judgment through improper conduct. Defendant never made any such assertion. This makes the case different from *Calloway v Marvel Entertaining Group*, 854 F2d 1452 (2nd Cir 1980), reversed on other grounds sub nom. *Pavelic & LeFlore v Marvel Entertainment Group*, ___ US ___, 110 S Ct 456, 107 L Ed2d 143 (1989). In that case the plaintiff avoided sanctions by submitting affidavits to the court representing that key documents had unauthorized signatures on them and then dramatically recanted from those representations in testimony at trial.

This was not a case where summary judgment was denied for administrative convenience, as was done in *Barrios v Pelham Marine, Inc*, 796 F2d 128, 133 (5th Cir 1986), where the district court decided to carry over a motion for summary judgment to trial because trial preparation had been completed and the trial was ready to begin. In that case, the judge did not decide the summary disposition motion on the merits. In this case, the trial court did decide it and found there was sufficient merit to enable the case to go to trial.

In assessing Rule 11 sanctions, Judge Bell said that at the time of filing (which was of course substantially before denial of the Motion for Summary Judgment) there was an insufficient factual basis to bring the claim. He did not dispute Judge Gibson's finding. He did not say that summary judgment should have been granted. Judge Bell simply determined that in his judgment the complaint was sufficiently lacking in substance to permit the imposition of sanctions.

The decision of the Sixth Circuit squarely raises the issue petitioners seek to have reviewed, i.e. whether courts should apply a different approach in determining complaints that are "well grounded in fact" than the approach used in determining whether the same evidence presents "material" issues of fact which should be resolved only by juries. The court in this case held specifically that it "need not determine the propriety of the district court's denial of G & G's motion for summary judgment." (A 12) It held squarely that different standards should be applied to determining Rule 11 motions and Rule 56 motions. (A 11-12)

This case presents the court with an opportunity to decide whether denial of a defendant's motion for summary judgment precludes the imposition of Rule 11 sanctions as a general rule. The court need not concern itself with whether there were peculiar facts or circumstances in this case (such as attorney misconduct in obtaining a favorable Rule 56 decision) which would confuse formulation of a general rule applicable to similar cases in the future.

D. Sanctions were not appropriate in this case.

Judge Gibson was right in determining that a material issue of fact precluded the entry of summary judgment. One of plaintiffs' claims was that the guard admittedly manufactured by G & G was defective because it was made of a material that degraded in the sort of weather a manufacturer might reasonably have expected a grain auger to be subjected to. It came

in parts which could be either incorrectly assembled by someone not well experienced with the equipment, or which would have permitted it to be only partially effective. Although it was apparently G & G's claim that the guard was not designed for this specific auger, it was clearly designed to protect the operators of grain augers of the same general type and description for which it was originally sold. Plaintiffs obtained well qualified experts in farm machinery safety. It was the opinion of these experts that the guard was defective and that it contributed to Mr. Mann's injury. See pp. 5-6, supra.

The courts below concentrated on the question of whether plaintiffs could reasonably have expected to prove their claim that the shaft was manufactured by G & G. This claim was abandoned by plaintiff at the motion for summary judgment. G & G submitted affidavits saying that it did not manufacture the shaft. Although the shaft was enclosed in machinery that had signs on it saying that it was made by Hutchinson and Hutchinson had previously responded to interrogatories saying that G & G supplied all of its shafts, there was no peculiar identifying mark or insignia on the shaft itself that said G & G manufactured it. Plaintiffs conceded that they would be able to come up with direct proof (as opposed to circumstantial proof) that the shaft itself was manufactured by G & G.

It was not unreasonable for plaintiffs' counsel to assume that a machine that said on its outside that it was manufactured or distributed by Hutchinson was in fact manufactured or distributed by Hutchinson. It was not unreasonable for plaintiffs' counsel to assume that the shaft in the machine apparently manufactured by Hutchinson was made by G & G when Hutchinson responded to interrogatories by saying that all the shafts it used in its machinery were manufactured by G & G. There was no reason for plaintiffs' counsel to judge G & G employees to be more credible than the well qualified experts they relied upon. G & G's employees said that G & G didn't make the shaft. Plaintiffs' expert, Dr. Trojan, and the dealer who sold the auger disputed G & G employees' conclusions. Plaintiffs counsel were sanctioned for continuing to press discovery and to seek concrete information about manufacture of the shaft, despite defendant's vigorous and self-serving denials. Apparently the judge felt that plaintiffs' counsel should have accepted G & G's conclusions and taken its word for its purported non-culpability, even though other people familiar with farm machinery were telling plaintiffs' counsel that there was at least a possibility that the shaft was one common

to Hutchinson augers, and, therefore, a G & G shaft or portion of a G & G shaft.

Both Judge Beli and Sixth Circuit emphasized Mr. Mann's testimony that he was aware of the existence of danger through the lack of an adequate guard. The mediators, who were lawyers well experienced with Michigan law, did not feel that it made his claim against G & G worthless. They felt that his claim was worth \$37,500. Under Michigan's product liability statute, the law of pure comparative negligence applied. If the jury found that Mr. Mann's negligence was 99% responsible for his injuries, then the jury would have determined his damages and reduced them by a factor of 99%. However, his claim would not have been barred. See *Karl v Bryant Air Conditioning*, 416 Mich 558, 562; 331 NW2d 456 (1982) (plaintiff's damages reduced 95% due to comparative negligence) and *Hardy v Monsanto Enviro-Chem*, 414 Mich 29, 41; 323 NW2d 270 (1982) which held:

"If a worker continues to work under extremely unsafe conditions when a reasonable worker under all the facts and circumstances would 'take a walk,' the *trier of fact* might appropriately reduce the plaintiff's recovery under comparative negligence."

(Emphasis added)

Mr. Mann's vague awareness of the risk of using unguarded machinery was not a bar to his claim of defect in the manufacture of safety devices for the grain auger. *Owens v Allis-Chalmers Corp*, 414 Mich 413, 425; 326 NW2d 372 (1982) held:

"Obvious risks may be unreasonable risks, and there is no justification for departing from general negligence and breach of implied warranty principals merely because the dangers are patent."

This holding was explained in *Horen v Coleco Industries, Inc*, 169 Mich App 725, 729; (1988); application for leave held in abeyance 4/30/90, Docket # 88580, where the court explained that:

"a manufacturer is not automatically excused from responsibility merely by showing the risks inhering in a simple tool or product

are open and obvious. Although such a determination may be utilized as one factor among others to conclude that the manufacturer had no duty to warn because the product is not unreasonably dangerous, the new test is whether the risks are unreasonable in light of the foreseeable injuries." (Citation omitted.)

The court went on to say that:

"Where ... injury was reasonably foreseeable, the manufacturer's use of reasonable care in guarding against unreasonable or foreseeable risks is a jury question, even where the danger is obvious."

Horen involved a question of whether a pool manufacturer was obliged to warn potential users of the danger of paraplegia or death that could result from diving into the shallow water. *Horen* concluded that:

"Even should the evidence establish Mr. Horen's consciousness of a vague danger, this would not preclude a jury from finding that a warning was nevertheless required to give full appreciation of the life-threatening risks involved." 169 Mich App at 731.

The issues raised by *Horen* are presently before the Michigan Supreme Court by virtue of its grant of leave to appeal in *Glittenburg v Wilcenski*, 433 Mich 880; 446 NW2d 168 (1989), a case where the Court of Appeals reached a conclusion opposite to that reached in *Horen*.

The exact nature of a manufacturer's duty to warn of "open and obvious" risks is in a state of flux in Michigan. There was a reasonable basis in Michigan law for plaintiffs' counsel to believe that at most the open and obvious nature of the purported defect in the grain auger would have served to reduce Mr. Mann's recovery, not to eliminate it. Judge Bell and the Sixth Circuit decided, apparently, that Mr. Mann's negligence was so great as to preclude the possibility of any recovery even though under Michigan law the extent of comparative negligence is a jury question. *Dayhuff v General Motors Corp*, 103 Mich App 177; 303 NW2d 179 (1981). The courts below should not have imposed substantial sanctions on plaintiff's counsel for pursuing this jury triable issue.

Decisions from other courts have held that abandonment of a claim after it appears that it is no longer provable is an appropriate course and is not sanctionable. Still other courts have held that sanctions may not be imposed because of the failure or inability to prove particular factual assertions in a complaint, if other aspects of the complaint are well ground in fact or later proved to be true.

Murphy v Business Cards Tomorrow, Inc., 854 F2d 1202, 1205 (1988) rejected Rule 11 sanctions where the defendants argued that two allegations in amended complaint were plainly false where other allegations were substantiated. This holding was cited with approval in *Romero v City of Pomona*, 883 F2d 1418, 1429 (9th Cir 1989) where the court said:

"That some of the allegations made at the outset of the litigation later proved to be unfounded does not render frivolous a complaint that also contains some non-frivolous claims. See *Golden Eagle Distributing Corporation v Burroughs Corp.*, 801 F2d 1531, 1540-41 (9th Cir. 1986) (Rule 11 sanctions inappropriate where only a portion of an otherwise meritorious pleading, motion or paper is frivolous)."

Although some circuits, including the 6th Circuit, have held that Rule 11 imposes an affirmative duty to amend complaints containing allegations that counsel later determines to be unsupported (*Herron v Jupiter Transportation Company*, 858 F2d 332, 336 (6th Cir 1988)) other courts have held that it is an acceptable practice to simply abandon those claims without amendment, as was done by plaintiffs' counsel in this case. See *Corporation of the Presiding Bishop v Associated Contractors, Inc.*, 877 F2d 938, 942-943 (11th Cir. 1989), cert. den., 107 L Ed2d 1038 (1990).

When it became apparent to plaintiffs' counsel that they would have nothing to contradict defendant's say-so that it did not manufacture the shaft, they abandoned the claim. This was not a significant concession, in counsel's view, because Mr. Mann would not have been injured if the shaft, regardless of who manufactured it, had been surrounded by a guard that maintained its integrity. There were no defense costs incurred on this issue after G & G's motion for summary judgment was heard. The court did not decide that any portion of the discovery related to this issue was unreasonable, unnecessary or that the claim was pursued beyond the point

that it should have been pursued. The court prohibited further discovery, but did not impose discovery sanctions.

G & G's lawyer seemed to concede that at the time of the injury the shaft was not well guarded. He admitted that the guard had degraded through exposure to the elements and that a substantial portion of it was missing. Had the entire guard been in place, it would not have been possible for Mr. Mann to come in contact with the shaft. Still, Judge Bell held that the inadequacy of the guard designed to prevent contact with the shaft did not "cause" the accident. This holding was at odds with Judge Gibson's holding that a jury should determine whether the guard was inadequate and whether it had a causal relationship to the injuries suffered and whether G & G was responsible for deficiencies in the guard. Judge Bell had essentially the same evidence to review on this issues as did Judge Gibson.

Both Judge Bell and the Sixth Circuit ignored the existence of testimony available to plaintiffs which said that regardless of whether the shaft was entirely guarded or not, the defective G & G guard played a causative role in the accident. The Sixth Circuit emphasized that laymen interviewed by Plaintiff's counsel before filing suit concluded by Mr. Mann's clothing first came in contact with a portion of the shaft away from the guard. (A 9-10) However, plaintiff's experts Drs. Trojan and Buchele reviewed the same information available to these laymen and determined that they were wrong. (A 118).

The decisions below amounted to a holding that plaintiff's counsel were obliged to credit the expected testimony of witnesses to be relied on by G & G over the testimony of the experts they retained. Even though a jury could have believed plaintiffs' experts and awarded them money, the courts below sanctioned plaintiffs' counsel for pursuing a winnable claim because they did not credit the testimony of plaintiffs' experts. If this is a proper interpretation of the analysis to be applied by district courts on request for sanctions under Rule 11, it has alarming implications for the practicing bar. This court should, at a minimum, grant certiorari so as to provide some guidance to counsel in lower courts.

As the Sixth Circuit said in *Mihalik v Pro Arts, Inc*, 851 F2d 790, 794 (6th Cir 1988):

"It is not per se unreasonable to initiate a law suit and pursue a possible claim where the defendant may have a strong defense."

In so holding, the court rejected defendant's argument that:

"[W]here a plaintiff or his attorney knows that the defendant has a strong, and possibly winning, defense, they will be sanctioned if they file a complaint."

What happened in this case was exactly what the *Mihalik* court said should not happen. The defendant argued that because it had spent substantial time and money defending a claim on which it believed from the beginning it had a strong defense, the plaintiffs should have the burden of defending the action shifted to them because G & G prevailed.

In *Mihalik*, the Sixth Circuit quoted with approval from the Note, *The Dynamics of Rule 11: Preventing Frivolous Litigation by Demanding Professional Liability*, 61 NYUL Rev. 300, 304-305 (1986), where it was said:

"The Supreme Court has recognized that the results of litigation are frequently uncertain and that making an accurate prediction of how the court will resolve a case does not warrant a penalty."

If this rule is not already clear to the Courts of Appeals and district courts, this case provides an excellent vehicle for clarifying the intended effect of Rule 11.

All lawyers have an ethical obligation to pursue their clients' claims diligently, within the bounds of the law. As long as the Manns wanted to pursue their claim, it was their lawyers' duty to resolve doubts concerning the efficacy of the claim in their clients' favor and pursue it, so long as they could do it in accordance with Rule 11 and other applicable ethical obligations.

Western District of Michigan local Rule 19(c) provided that:

"The standards of professional conduct of member of the bar of the Court shall include the current Code of Professional Responsibility of the American Bar Association. For a willful violation of any of these canons in connection with any matter pending before this Court, an attorney may be subjected to appropriate disciplinary action."

At all times pertinent to this case the applicable of Professional Responsibility was the ABA Model Code of Professional Responsibility as amended in 1983. Canon 7 of that Code provided that "a lawyer should represent a client zealously within the bounds of the law." This is a familiar formulation of the responsibility of lawyers and has been widely adopted throughout the nation. If plaintiffs' counsel had not pursued the claim after prevailing on a motion for summary judgment they would have run afoul of this Rule. In *Re Ratzel*, 108 Wis2d 447; 321 NW2d 543 (Wis. 1982) the court reprimanded a lawyer who did not file and answer and counter-claim desired by his client, even though the lawyer had "concluded that an answer or counter-claim was a hopeless undertaking," and even though the referee who determined the disciplinary charges "noted that it probably would not have made a difference in the outcome of the matter . . ." There was a plausible basis for advancing the client's demands and the lawyer was reprimanded for not advancing them.

Michigan's Code of Professional Responsibility previously included Canon 7. In ruling on grievances against a lawyer who was accused of "representing his clients too zealously" the court said in *State Bar v Corace*, 390 Mich 419, 434; 213 NW2d 124 (1973):

"There are a large number gray areas in the law. When a question is doubtful the lawyer's obligation to his client permits him to assert the view of the law most favorable to his client's position.

* * *

"A lawyer may not properly be disciplined for acting without the bounds of the law unless it is established that he knowingly advanced a claim or defense that was unwarranted."

Plaintiffs' counsel had good reason to believe that it would be unethical for them not to pursue a claim which the judge said was one on which reasonable jurors could fairly return a verdict in favor of their clients. If the claim was weak or doubtful, they, nevertheless, had the duty to fulfill their clients' wishes in pursuing it. They knew that they had not won the summary judgment motion by improper means. If the rule announced by the lower courts in this case is permitted to stand, all future counsel will run the risk of being put in a position where it is unethical for them to fail to pursue a claim that might result in the imposition of very substantial

sanctions. This dilemma is of general interest to the practicing bar and this Court should take the opportunity presented to it to resolve the question.

II. ONLY THOSE WHO SIGNED OFFENDING PAPERS MAY BE SANCTIONED UNDER RULE 11.

Judge Bell imposed joint and several liability for the full cost of G & G's defense on every lawyer and firm associated with the prosecution of the action, without regard to which pleadings, if any, any of the individual lawyers had signed. At the time of his decision, Judge Bell did not have the benefit of this court's decision in *Pavelic & LeFlore v Marvel Entertainment Group*, 110 S Ct 456, 107 L Ed2d 438 (1989). That case held that Rule 11 meant what it said and that sanctions could be imposed only upon "the person who signed" an offending paper.

The Sixth Circuit's refusal to reverse outright the sanctions against James Thomas Sloan, Jr. and Gary C. Newton was clearly wrong given the decision in *Pavelic & LeFlore*. The sanctioning of some of these petitioners serves to dramatically underscore the first issue presented in this petition. Sanctions consisting of the entire cost of defense were imposed upon Attorney Gary C. Newton, even though most of the papers he signed related to a Motion for Summary Judgment which he won or the notice attempting to accept the mediation or the motion to dismiss. He did not sign the Amended Complaint. He did not sign any paper which Judge Bell found specifically to be not "well grounded in fact."

Attorney James Thomas Sloan, Jr. did not sign the Amended Complaint. He did not sign any of the documents in the file with the exception of a notice designating an expert witness. The decisions below were clearly wrong in deciding that any attorneys other than the ones who signed offending papers should be sanctioned and in refusing to identify the paper which violated Rule 11.

Pavelic & LeFlore rejected the argument that sanctions against law firms, as well as individual signers should be permitted, because the "partnership's knowledge that it was subject to sanction might induce it to increase 'internal monitoring' . . ." Even if that argument had been accepted in the *Pavelic & LeFlore* decision, the goal of insuring "internal monitoring", by subjecting the law firms to sanctions would not have worked in a case such as this where the court imposed sanctions for pursuing a claim that the court would have permitted to go to a jury. If all of the lawyers in the sanctioned firms had been reviewing the file, it is

doubtful that any of them would have been overly concerned about the imposition of sanctions after learning that defendant's motion for summary judgment had been denied because the judge thought the case ought to go to a jury.

Similarly, the lawyer who actually signed whatever paper it was that Judge Bell ultimately deemed to be most offending, should have been able to take comfort in the fact that plaintiff prevailed on the Motion for Summary Judgment.

CONCLUSION

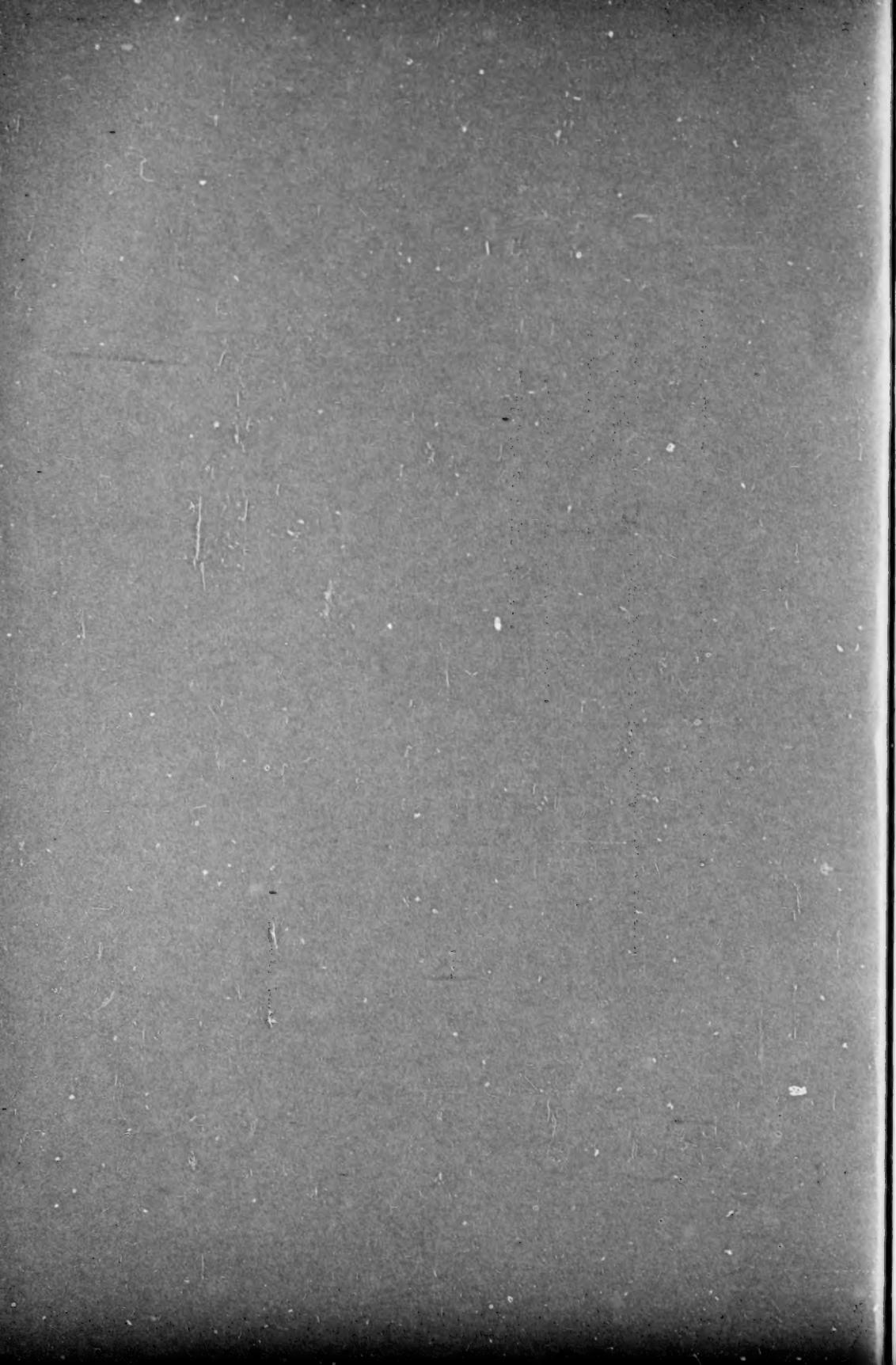
The Sixth Circuit applied a different standard to determine whether the Amended Complaint was "well grounded in fact" than was applied to the same set of facts under Rule 56 to determine whether there was a dispute over any "material" fact so that the case would go to a jury. The lower courts sanctioned lawyers without regard to whether they had signed papers that offended Rule 11 or not.

The Complaint was well-grounded in fact. The plaintiffs' counsel had secured experts who held the opinion that the guard manufactured by G & G was defective and causally related to the accident. The court should grant certiorari to address the issues presented in the petition.

DATED: August 21, 1990

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In the

SUPREME COURT OF THE UNITED STATES

October Term 1990

JAMES THOMAS SLOAN, JR., FREDRICK J. FARRER
and GARY C. NEWTON,
Petitioners,

-vs-

G & G MANUFACTURING, INC., a Nebraska corporation,
Respondent

*On Petition of Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit*

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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RECOMMENDED FOR FULL TEXT PUBLICATION
See Sixth Circuit Rule 24

No. 88-1622

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

HAROLD MANN and JEAN MANN,
Plaintiffs,

JAMES THOMAS SLOAN, JR.,
FREDRICK J. FARRER, GARY C.
NEWTON; and SLOAN, BENEFIEL,
FARRER, NEWTON & GLISTA; and
SLOAN, BENEFIEL & STEVENS,
Appellants,

On Appeal From the
United States District
Court for the Western
District of Michigan

v.

G & G MANUFACTURING, INC., A
Nebraska corporation,
Defendant-Appellee.

Decided and Filed April 12, 1990

Before: KEITH, JONES and GUY, Circuit Judges

KEITH, Circuit Judge, delivered the opinion of the court, in which GUY, Circuit Judge, joined. JONES, Circuit Judge (p.19) delivered a separate concurring opinion.

KEITH, Circuit Judge: Attorneys James Thomas Sloan, Jr., Fredrick J. Farrer, and Gary C. Newton, and the current or former law firms of

Sloan, Benefiel, Farrer, Newton & Glista, and Sloan, Newton, & Stevens (collectively "plaintiffs' counsel"), appeal from the district court's judgment imposing sanctions pursuant to Federal Rule of Civil Procedure 11. For the following reasons, we **AFFIRM** in part and **REVERSE** in part.

I.

On November 9, 1982, plaintiff Harold Mann suffered severe leg injuries when his clothing became entangled in the power take-off shaft ("PTO shaft") of the grain elevator ("auger") that he was operating on his farm in Constantine, Michigan. Mr. Mann and his wife, Mrs. Jean Mann (collectively "plaintiffs"), retained counsel to represent them in a products liability action against the auger's manufacturer, defendant Hutchinson Division of Lear Siegler, Inc. ("Hutchinson").

In May and June 1983, plaintiffs' counsel took statements from: Paul Trojan, a Professor of Metallurgical Engineering at the University of Michigan; Denny Mann, plaintiffs' son; Raymond Stutzman, the previous owner of the auger; and Robert Brewer, Chief of the Constantine Police Department, who investigated the accident.¹

In his discussions with plaintiffs' counsel, Dr. Trojan opined that there were substantial defects in the plastic guard which was designed to protect the PTO shaft of plaintiffs' auger. Dr. Trojan explained: first, that due to its exposure to the environment, the plastic guard had decayed substantially and could not withstand the force of a man falling against it; second, that the guard was poorly designed because its two pieces could separate leaving a guard system which did not cover the entire shaft; and third, that the guard was improperly manufactured from plastic when a metal guard would have been less susceptible to environmental damage.² See Joint Appendix ("J.A.") at 456-97.

In his statement, Mr. Stutzman explained that he purchased the subject auger "used," and at that time, its PTO shaft did not have a complete guard. After owning the auger for two years, Mr. Stutzman sold

¹As part of a preliminary investigation, plaintiffs' counsel took statements from these individuals before a complaint was filed.

²Plaintiffs' counsel later took statements from two agricultural engineering experts, Dr. Lee R. Nylander and Dr. Wesley Buchele, who corroborated Dr. Trojan's statements.

it to Mr. Mann "in the same condition." J.A. at 685. Denny Mann indicated that during the time plaintiffs owned the auger, its PTO shaft did not have a complete guard. Thus, the PTO shaft remained effectively uncovered. He specifically stated that the auger's "complete power take-off[shaft] was there. You have a piece that slides in. . . And half that goes to the tractor. The plastic guard wasn't there." J.A. at 671-72.

When plaintiffs' counsel spoke to Chief Brewer, he explained that immediately after the accident, portions of Mr. Mann's clothing were caught on a "sharp projection on the bare, unguarded portion of the PTO shaft." Chief Brewer concluded that "at the time I saw the projection, I felt that this projection was the location where Mr. Mann's clothing first began to be entangled on the PTO shaft." J.A. at 687.

After this preliminary inquiry, plaintiffs' counsel filed a complaint against Hutchinson on February 27, 1984. Plaintiffs alleged that defects in Hutchinson's design and/or manufacture of the auger sold to Mr. Mann were the proximate cause of his injuries.

Hutchinson deposed Mr. Mann on March 28, 1985. Mr. Mann testified that at the time of the accident, he was an experienced farmer; that he knew why farm machinery should remain guarded; that he knew it was a good safety practice to keep loose clothing away from operating farm machinery. Mr. Mann stated that he had examined his auger and was aware that more than half of the guard on the PTO shaft was missing. Mr. Mann also indicated that he knew that the entire PTO shaft was supposed to be guarded; and that he recognized that his auger was less safe without a guard. Mr. Mann concluded that if the entire PTO shaft had been guarded, his accident might not have occurred.

On April 8, 1985, plaintiffs' counsel deposed Hutchinson's Vice-President of Engineering, Dwight Beninga. Mr. Beninga explained that his firm generally supplies augers with PTO shafts and guards produced by G & G Manufacturing, Inc. ("G & G"). After reviewing photographs of Mr. Mann's accident, however, Mr. Beninga concluded that plaintiffs' auger did not contain a PTO shaft produced by G & G and supplied by Hutchinson. Mr. Beninga offered several reasons for his conclusion; first, the plaintiffs' PTO shaft separates and the PTO shaft that Hutchinson supplies was "produced in such a way that the two parts would not separate;" second, the plaintiffs' PTO shaft does not contain a pinhole and PTO shafts supplied by Hutchinson have pinholes; and third, the "universal joint [of the plaintiffs' PTO shaft]. . . is just not similar to the

kind that Hutchinson supplies. This appears to be some sort of forging or casting construction. The Hutchinson-supplies unites are a malleable iron stamping kind of construction." J.A. at 603.

Even though the initial discovery revealed: that the PTO shaft was neither supplied by Hutchinson nor produced by G & G; that Mr. Mann's initial point of contact with the PTO shaft was the uncovered end of the shaft; and that Mr. Mann fully appreciated the risks of operating an unguarded PTO shaft, plaintiffs' counsel filed an amended complaint on June 14, 1985, naming G & G as a co-defendant in their action against Hutchinson (collectively "defendants").

On October 22, 1985, G & G answers plaintiffs' complaint. On November 14, 1985, plaintiffs noticed the deposition of several G & G officials. G & G protested the scope and location of the depositions requested by plaintiffs' counsel. To prepare for the depositions, James Hergert, G & G's Product Safety Representative, traveled from Omaha, Nebraska to Constantine, Michigan to inspect plaintiffs' auger. After the January 21, 1986 inspection, Mr. Hergert explained to plaintiffs' counsel that no part of plaintiff's PTO shaft had been manufactured by G & G. Instead, it had been "cannibalized," or assembled from parts of several different PTO shafts. G & G's counsel requested that either Mr. Hergert be deposed in Constantine or that plaintiffs accept his sworn affidavit in lieu of deposition. Plaintiffs' counsel demanded the Mr. Hergert be deposed in Omaha.

On January 22, 1986, plaintiffs' counsel received a letter form G & G's counsel, seeking to avoid the unnecessary expense of an Omaha deposition. In the letter, G & G's counsel outlined Mr. Hergert's anticipated testimony that the PTO shaft was not a G & G product. G & G's counsel also explained that the depositions of its witnesses would be limited to whether G & G designed, manufactured or distributed the subject PTO shaft. Finally, G & G's counsel warned that since Mr. Hergert's statements clearly established that plaintiffs' product liability action was not well grounded in fact, G & G intended to seek sanctions under Rule 11.³

Nevertheless, plaintiffs' counsel deposed Mr. Hergert and Wayne Eipperle, G & G Vice-President for Research and Development, in Omaha. On January 29, 1986, both Mr. Hergert and Mr. Eipperle testified that the

³With letters dated January 2, 1987, March 11, 1987, and December 22, 1987, G & G's counsel notified plaintiffs' counsel of G & G's intention to seek Rule 11 sanctions.

PTO shaft had not been design, manufactured, or distributed by G & G.

On March 10, 1986, plaintiffs' counsel moved to compel discovery beyond the limits set by G & G. On April 14, 1986, the magistrate denied plaintiffs' motion to compel discovery, limited discovery to whether G & G manufactured the PTO shaft, and warned that sanctions could be awarded against plaintiff's counsel. The magistrate's May 12, 1986 order was affirmed by the district court on October 15, 1986.

Following additional conflict between the parties as to the scope of discovery, Hutchinson moved for a protective order on November 17, 1986. After conducting a hearing, the magistrate granted Hutchinson's motion on January 14, 1987. The magistrate concluded:

[T]he uncontradicted evidence is overwhelming that all of the PTO shafts and guards obtained by [Hutchinson] for this type of auger came from G & G Manufacturing, and that that PTO shaft attached to this particular auger (which was apparently a cannibalized PTO shaft attached by persons unknown) was not a G & G product.

J.A. at 87A (quoting *Mann and Mann v. Hutchinson Division, Lear Siegler, Inc.*, K84-71-CA4 (W.D. Mich. Jan. 14, 1987) (protective order)).

At his deposition on February 2, 1987, Mr. Mann reiterated the statements he had given to plaintiffs' counsel. Mr. Mann indicated that if had followed his grandfather's advice concerning the safe operation of farm machinery, he would not have been injured in the auger accident.

On February 16, 1987, this matter was submitted to mediation, pursuant to Western District of Michigan Rule 42.⁴ Plaintiffs were awarded no damages against Hutchinson and \$37,500 in damages against G & G. Although Hutchinson and G & G accepted the mediation awards, plaintiffs rejected them.

On April 9, 1987, the district court conducted a hearing to dispose of the motions for summary judgment which defendants have filed on March 31, 1986. Hutchinson's motion was granted. However, because a factual dispute remained concerning the guard on plaintiff's auger, the court denied G & G's motion for summary judgment on April 14, 1987. The court explained that plaintiffs' counsel had presented a theory that G & G

⁴W.D. Mich. Rule 42 provides for payment of actual costs if a party rejecting mediation does not obtain a more favorable verdict at trial.

had manufactured a defective guard; and that the guard, which should have been covering the PTO shaft at the time of the accident, deteriorated due to the elements. As a result, the guard failed to protect Mr. Mann when he fell upon the PTO shaft. The court then cautioned plaintiffs' counsel that if they did not prove their case, it would grant a motion for a directed verdict.

On April 24, 1987, plaintiffs' counsel filed a "Notice of Withdrawal of Mediation Rejection." G & G's counsel moved to strike plaintiffs' notice to accept the mediation award two months after the mediation decision. On June 24, 1987, the magistrate granted G & G's motion.

Plaintiffs' counsel deposed G & G's expert, William Field, a Purdue University Professor, in Lafayette, Indiana on December 4, 1987. Professor Field, who is also Chairman of the Power Take-Off Task Force of the National Safety Council, concluded that by alleging that G & G negligently designed or manufactured the subject PTO shaft and guard, plaintiffs' counsel presented a frivolous argument:

[First], the setup of the loading equipment and the auger bin arrangement contribute[d] to a potential exposure to hazardous equipment or to equipment that has a potential for injury. Second[], the equipment that was being used at the time was unguarded and presented a very real risk or hazard to anybody that might be using the equipment. Third[], the composition of the [PTO shaft suggests that it is] manufactured by G & G when, in fact, it appears that it is not. [Fourth], the availability of replacement shielding is easy and there is no hindrance to the plaintiff in obtaining the missing components that would have made it an appropriately safe [PTO shaft].

J.A. at 652-53.⁵

Plaintiffs filed a motion or voluntary dismissal on December 30, 1987, less than three weeks before the January 19, 1988 trial date. Although G & G did not object to plaintiffs' motion, it did object to their request for an award of only \$500 in costs. At a January 12, 1988 hearing, the district court granted plaintiffs' motion for voluntary dismissal, but reserved the issue of costs.

⁵Professor Field's statements were corroborated by the deposition of another G & G expert, Dale Gumz, a forensic and safety engineer.

On April 26, 1988, the district court heard G & G's motion for imposition of costs and sanctions. After considering both parties' arguments, the court granted the Rule 11 motion for sanctions for several reasons; first, because G & G did not manufacture the subject PTO shaft, plaintiffs' counsel did not present a complaint well-grounded in fact; second, immediately after the complaint was filed, G & G's counsel consistently and correctly argued that the PTO shaft was not a G & G product; and third, even if the plastic guard was manufactured by G & G, the injury was not related to the guard because Mr. Mann's direct contact with the PTO shaft caused his injuries. On May 9, 1988, judgment for attorney fees and costs in the amount of \$40,487.61 was entered in favor of G & G and against plaintiffs' counsel. J.A. at 372-73 (citing Mann and Mann v. G & G Manufacturing, Inc., K84-71-CA4 (W.D. Mich. May 9, 1988) (judgment for costs and sanctions)).

Plaintiffs' counsel filed a timely notice of appeal with this court on June 3, 1988.

II.

Federal Rule of Civil Procedure 11, as amended effective August 1, 1983, provides in part:

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated....The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper, that to the best of his knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation....If a pleading, motion, or other paper is signed in violation of this rule, the court upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of reasonable expenses incurred because of the

filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

In *Century Products, Inc. v Sutter*, 837 F.2d 247 (6th Cir. 1988), we explained that in this circuit, the test for the imposition of Rule 11 sanctions is whether the individual attorney's conduct was reasonable under the circumstances. See *id.* at 253; *INVST Financial Group, Inc. v. Chemical Nuclear Systems*, 815 F.2d 391, 401-02 (6th Cir.), cert. denied, 484 U.S. 927 (1987); *Albright v. Upjohn Co.*, 788 F.2d 1217, 121 (6th Cir. 1986). "The question of whether an individual's conduct was reasonable under the circumstances is a mixed question of law and fact. In light of the district court's more intimate knowledge of the facts of these cases, this court has determined that an abuse of discretion standard of review of the district court's decision to grant Rule 11 sanctions is proper." *Century Products*, 837 F.2d at 253. See also *Mihalik v. Pro Arts, Inc.*, 851 F.2d 790, 793 (6th Cir. 1988).

We must grant the district court wide discretion to determine whether the conduct of plaintiffs' counsel was reasonable. The district court, however, "is expected to avoid using the wisdom of hindsight and should test the signor's conduct by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted." *INVST*, 815 F.2d at 401 (quoting Fed. R. Civ. P. 11 Advisory Committee's Note to the 1983 Amendment).

Plaintiffs' counsel may not prevail on appeal merely by showing that they acted *in good faith*. See *INVST*, 815 F.2d at 401. Plaintiffs' counsel must show that the district court abused its discretion in finding that their conduct did not meet an *objective standard of reasonableness under the circumstances*. See *id.* See also *Albright*, 788 F.2d at 1221; *Eavenson, Auchmuty & Greenwald & Holtzman*, 775 F.2d 535, 540 (3d Cir. 1985); *Westmoreland v. CBS, Inc.*, 770 F.2d 1168, 1177 (D.C. Cir. 1985).

Although the district court did not set forth in writing the basis for imposing Rule 11 sanctions on plaintiffs' counsel, we will review the oral statements of the district court found in the record. J.A. at 696-717 (citing *Mann and Mann v. G & G Manufacturing, Inc.*, K84-71-CA4 (W.D. Mich. Apr. 26, 1988) (motion for imposition of costs and sanctions)). Accord *INVST*, 815 F.2d at 401 n.4 ("Rule 11 does not require written findings of fact and conclusions of law but the presence of such a statement in the record facilitates appellate review."); *Rodgers v. Lincoln Towing Service*,

Inc., 771 F.2d 194, 205-06 (7th Cir. 1985) (upholding an award of Rule 11 sanctions even though no formal hearing was held to examine plaintiff's factually deficient complaint). The district court is entitled to deference; therefore, we will limit our inquiry to whether the district court abused its discretion in imposing Rule 11 sanctions on plaintiffs' counsel. *See Mihalik*, 851 F.2d at 793 (concluding that in Rule 11 cases, appellate courts should apply an appropriately deferential standard of review); *Stevens v. Lawyers Mutual Liability Insurance Co.*, 789 F.2d 1056, 1060 (4th Cir. 1986) ("[A] district court's imposition of Rule 11 sanctions is ordinarily entitled to deference of this Court and may not be disturbed except for abuse of discretion.").

A.

On appeal, plaintiffs' counsel argues that the district court abused its discretion in determining that the amended complaint filed against G & G was not well-grounded in fact. We disagree with the argument advanced by plaintiffs' counsel and find no abuse of discretion.

Under Rule 11, sanctions may be imposed if a reasonable inquiry would have disclosed that the pleading, motion or other paper was not well-grounded in fact. *See Westmoreland v. CBS, Inc.*, 770 F.2d 1168, 1174 (D.C. Cir. 1985). As soon as the complaint is filed, Rule 11 applies to the conduct of plaintiffs' counsel. After the complaint is filed, plaintiffs' counsel retain a continuing responsibility to review their pleadings and, if necessary, to modify them to conform with Rule 11. "Failure to do so permits the district court, within its discretion, to impose sanctions against the offending litigant or attorney when a reasonable inquiry would have disclosed that the complaint was either lacking in factual support or unwarranted by existing law." *Herron v. Jupiter Transportation Co.*, 858 F.2d 332, 336 (6th Cir. 1988).

In the amended complaint, plaintiffs' counsel argued that the auger contained in the PTO shaft designed and manufactured by G & G and that the allegedly defective PTO shaft caused Mr. Mann's accident. At the sanctions hearing, the district court explained that this initial theory lacked factual support.

Prior to filing the amended complaint, plaintiffs' counsel deposed Mr. Beninga, who explained that Hutchinson usually supplies augers with PTO shafts and guards produced by G & G. Mr. Beninga, however,

subsequently offers several cogent arguments supporting his conclusion that plaintiffs' auger did not contain a PTO shaft produced by G & G. After plaintiffs' counsel filed their amended complaint against G & G, Mr. Beninga's testimony that the subject PTO shaft was not a G & G product was corroborated by Professor Field, Mr. Hergert and Mr. Eipperle. They agreed that plaintiffs' previously owned auger contained a PTO shaft which was constructed from parts designed by several different manufacturers. Because this evidence was available to plaintiffs before they filed the amended complaint, plaintiffs' counsel knew or should have known that the PTO shaft was not designed or manufactured by G & G. A reasonable inquiry would have revealed that the first theory in plaintiffs' amended complaint against G & G was not well-grounded in fact.

Plaintiffs' counsel similarly argued that the auger contained a plastic guard designed and manufactured by G & G and that the allegedly defective plastic guard caused Mr. Mann's accident and injuries. At the sanctions hearing, the amended complaint's second liability theory was also rejected by the district court.

As part of their initial investigation prior to bringing this lawsuit, plaintiffs' counsel deposed Denny Mann and Mr. Stutzman. Both men testified that at the time of Mr. Mann's accident, plaintiffs' auger did not have a complete plastic guard covering the PTO shaft. Moreover, plaintiffs' counsel deposed Mr. Mann, who admitted that before the accident, he recognized and appreciated the danger of operating his auger with an effectively unguarded shaft, but used his auger despite that knowledge. In addition, plaintiffs' counsel were informed by Chief Brewer that Mr. Mann's clothing originally became entangled on a sharp projection of the PTO shaft several inches away from the partial guard. After plaintiffs' counsel filed the amended complaint, Professor Field and Mr. Gumz, both G & G expert witnesses, testified that a PTO shaft with a partial guard is considered unguarded because the guards have a limited life, farm equipment manufacturers, including G & G, customarily sell replacement guards. Professor Field and Mr. Gumz concluded, however, that Mr. Mann's accident was caused, in large part, by his failure to purchase a complete replacement guard system for his auger.

A reasonable pre-filing inquiry would have revealed these facts to plaintiffs' counsel. Plaintiffs' counsel knew or should have known: first, that at the time of the accident, a complete plastic guard produced by G & G was not attached to plaintiffs' auger; and second, that the accident was

not caused by an allegedly defective plastic guard produced by G & G. Because a reasonable inquiry would have disclosed that plaintiffs' amended complaint was not well-grounded in fact, the district court did not abuse its discretion by imposing Rule 11 sanctions on plaintiffs' counsel.⁶

B.

Plaintiffs' counsel also contends that the district court abused its discretion by granting G & G's Rule 11 motion for sanctions after denying G & G's Rule 56 motion for summary judgment.⁷ G & G responds that a denial of a motion for summary judgment does not preclude a grant of a motion for sanctions against the prevailing party. We agree.

Before considering the merits of the contention advanced by plaintiffs' counsel, we must review the two distinct approaches employed by district courts in the disposition of Rule 56 and Rule 11 motions. Although the litigation schedule rests within the discretion of the district court, the Rule 56 motion is often granted or denied shortly after it is made. *See Donaldson v. Clark*, 819 F.2d 1551, 1554 (11th Cir. 1987). In comparison, the Rule 11 motion is generally determined at the end of the proceedings. *See id.* at 1555 (citing Fed. R. Civ. P. 11 Advisory

*Plaintiffs' counsel also argues, on appeal, that the district court abused its discretion by not specifying which pleadings or papers violated Rule 11. We find this argument unpersuasive.

At the sanctions hearing on April 26, 1988, the district court explained that a "factual predicate to show the involvement of G & G" in Mr. Mann's accident has never existed. J.A. at 712. In its May 9, 1988 order, the district court stated that Rule 11 "was violated by each attorney who signed *any* pleading or appeared at *any* proceeding on behalf of plaintiffs." J.A. at 372 (emphasis added).

We find no abuse of discretion in the district court's conclusion that Rule 11 was violated by plaintiffs' amended complaint initially filed against G & G and all subsequent pleadings filed against G & G. A reasonable pre-filing inquiry should have persuaded plaintiffs' counsel that the amended complaint against G & G was not well-grounded in fact. Rule 11 was then continuously violated by the equally unreasonable, but later-filed pleadings of plaintiffs' counsel. *Cf. Herron v. Jupiter Transportation Co.*, 858 F.2d 332, 335-36 (6th Cir. 1988) ("[P]laintiff is impressed with a continuing responsibility to review and re-evaluate his pleadings and where appropriate modify them to conform to Rule 11."). Federal Rule of Civil Procedure 56(c) provides that summary judgment in favor of the moving party shall be granted "if the pleadings, depositions, answers or interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Committee's Note to the 1983 Amendment). When considering a Rule 56 motion for summary judgment, the district court views the evidence in the light most favorable to the non-moving party. *See, e.g., Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The district court does not weigh the evidence to "determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). In contrast, when evaluating a Rule 11 motion for sanctions, the district court "measure[s]" the conduct of the non-moving party's counsel "by an objective standard of reasonableness under the circumstances." *INVST*, 815 F.2d at 401. The district court then weighs the evidence to determine if counsel's pleadings, motions or papers are well-grounded in fact or warranted by existing law. *See Westmoreland*, 770 F.2d at 1174. Given the significant differences between these two approaches, it is not surprising that a district court's ruling on a Rule 56 motion for summary judgment need not determine the outcome of the district court's ruling on a Rule 22 motion for sanctions. *See Kamen v. American Telephone & Telegraph Co.*, 792 F.2d 1006, 1014 (2nd Cir. 1986).

In the present case, we need not determine the propriety of the district court's denial of G & G's motion for summary judgment. We need only determine whether the district court abused its discretion of imposing sanctions upon plaintiffs' counsel. When the district court denied G & G's summary judgment motion, it merely indicated that there was sufficient evidence to suggest that G & G manufactured the incomplete plastic guard on plaintiffs' auger. *See Anderson*, 477 U.S. at 249 (explaining that a district court may grant or deny summary judgment without making conclusive findings of fact). The district court did not weight the evidence to determine if plaintiff's theory—that the allegedly defective G & G plastic guard caused Mr. Mann's accident—was well-grounded in fact. *See Westmoreland*, 770 F.2d at 1174. The district court concluded that if plaintiffs' counsel failed to prove their theory, then the court would issue a directed verdict.

In ruling on G & G's summary judgment motion, the district court did not determine whether the plaintiffs' theory of causation was the truth or mere speculation formulated without reference to the facts; the record evidence; or the testimony of Mr. Mann, Denny Mann, Mr. Stutzman, or Professor Field. *Compare Whittington v. Ohio River Co.*, 115 F.R.D. 201, 206 (E.D. Ky. 1987) (imposing Rule 11 sanctions upon plaintiff's counsel

who named "all of the manufactures of a certain kind of drug, when a reasonable inquiry would have disclosed that the plaintiff only took the products of a few members of the industry").

- Since the initiation of this lawsuit against G & G, plaintiffs' case has been too theoretical and speculative to avoid a Rule 11 motion. Because the theories of causation advanced in plaintiffs' amended complaint and subsequent pleadings were not well-grounded in fact, the district court did not abuse its discretion by imposing sanctions upon plaintiffs' counsel.

C.

Plaintiffs' counsel maintains that the district court abused its discretion by imposing Rule 11 sanctions not only upon the individual attorneys who signed the amended complaint and subsequent pleadings filed against G & G, but also upon the law firms of those individual attorneys. G & G counters by arguing that Rule 11 sanctions may be imposed "on both the individual attorney and the law firm on whose behalf he signed the papers." *Calloway v. Marvel Entertainment Group*, 650 F.Supp. 684, 687 (S.D.N.Y. 1968), aff'd, 854 F.2d 1452 (2nd Cir. 1988). Because *Calloway* was reversed by the Supreme Court's decision in *Pavelic v. Leflore v. Marvel Entertainment Group*, 110 S.Ct. 456 (1989), we cannot accept the argument advanced by G. & G.⁸

In *Pavelic & Leflore*, the Supreme Court reviewed an essential Rule 11 provision, which provides: "If a pleading, motion, or other paper is signed in violation of this rule, the court . . . shall impose upon the person who signed it . . . and appropriate sanction. . ." See *Pavelic & Leflore*, 110 S.Ct. at 457 (quoting Fed. R. Civ. P. 11). Upon consideration of this provision, the Court held that Rule 11 authorizes a district Court to impose sanctions against the individual attorney who signed the offensive court

⁸In the present case, the district court imposed Rule 11 sanctions against plaintiffs' counsel, including both the individual attorneys and their law firms, on May 9, 1989. At that time, the circuit courts were in conflict concerning whether sanctions would be imposed against individual attorneys and/or their law firms. Compare *Calloway v. Marvel Entertainment Group*, 854 F.2d 1452, 1457 (2nd Cir. 1988) (concluding that "Rule 11 sanctions should generally be imposed on a signer's law firm as well as on the individual signing an offending paper") with *Robinson v. National Cash Register Co.*, 808 F.2d 1119, 1128-30 (5th Cir. 1987) (holding that Rule 11 authorizes sanctions only against the individual lawyer or lawyers who sign court papers). To resolve the conflict, the Supreme Court granted certiorari in *Calloway*. See 854 F.2d 1452 (2nd Cir. 1988), cert. granted, 110 S.Ct. 1116 (1989).

paper, but not against that attorney's law firm. The Court found that the Rule 11 phrase "person who signed" clearly refers to an individual attorney, and not to a law partnership. *See id.* at 458-59. Because the text of the rule establishes a nondelegable duty to file factually and legally responsible court papers, the Court explained, "one may reasonably expect [Rule 11] to authorize punishment only of the party upon whom the duty is placed." *Id.* at 459. The Court concluded that the underlying purpose of Rule 11 is better served by imposing sanctions only against individual attorneys:

[T]he purpose of Rule 11 as a whole is to bring home to the individual signer his personal, nondelegable responsibility. [This purpose is] better served by a provision which makes clear that, just as the court expects the signer personally - and not some nameless person within his law firm - to validate the truth and legal reasonableness of the papers filed, so also it will visit upon him personally - and not his law firm - its retribution for failing in that responsibility.

Id. at 460.

After considering the Supreme Court's opinion in *Pavelic & Leflore* and its explicit mandate to impose sanctions only upon the individual attorney who violates Rule 11, we cannot approve of the district court's judgment imposing sanctions in the amount of \$40,487.61 against Attorneys James Thomas Sloan, Jr., Fredrick J. Farrer, and Gary C. Newton, and the current or former law firms of Sloan, Benefiel, Farrer, Newton & Glista, and Sloan, Newton & Stevens, jointly and severally.

Accordingly, we **AFFIRM** the judgment of the district court insofar as it imposes Rule 11 sanctions against James Thomas Sloan, Jr., Fredrick J. Farrer, and Gary C. Newton, as individual attorneys. In addition, we **RESERVE** the judgment of the district court insofar as it imposes Rule 11 sanctions against the current or former law firms of Sloan, Benefiel, Farrer, Newton & Glista and Sloan, Newton & Stevens, or any attorneys jointly and severally. This case is **REMANDED** for a recalculation of the amount of the Rule 11 sanctions to be imposed upon each individual attorney⁹ and for further proceedings consistent with this opinion.

⁹In *Jackson v. Law Firm of O'Hara, Ruberg, Osborne and Taylor*, 875 F.2d 1224 (6th Cir.

JONES, Circuit Judge, concurring. As a court inferior to the Supreme Court, we are bound to follow its dispositions. This, I concur in the majority opinion. In concurring, I must nevertheless record my profound disagreement with the Supreme Court's holding that mandates the result we reach today. It seems to me that, in the least, in an appropriate case, there should be an opportunity accorded to one who signs a pleading to offer proof of the circumstances of the signing.

My hope is that in the fullness of time the reality of the law firm culture, in which many lawyers move and have their being, will become more apparent to the Supreme Court majority than is indicated by its holding in *Pavelic & Leflore v. Marvel Entertainment Group*.

1989), we explained:

[B]ecause deterrence, not compensation, is the principal goal of Rule 11, courts should impose the least severe sanction that is likely to deter ... When a fraction of the actual and reasonable fees requested is sufficient to deter future violations, it is not an abuse of discretion to award such a lesser amount. Failure to consider ability to pay is, however, an abuse of discretion.

Id. at 1229-30 (citations omitted).

Given the teachings of *Jackson* and our reversal of the district court's imposition of Rule 11 sanctions against the law firms named in the present case, we have concluded that a recalculation of the amount of the sanctions to be imposed against the individual attorneys is warranted. Since law firms generally have more funds than individual signing attorneys, economic deterrence may be visited upon the individual attorneys through Rule 11 sanctions of a lesser amount. See *Pavelic & Leflore*, 110 S.Ct. at 460 (explaining that there is greater economic deterrence when the individual attorney knows that he will be solely liable.) See also *INVST*, 815 F.2d at 404 (suggesting that to serve the deterrence goal of Rule 11, it may not be necessary to impose sanctions in an amount equal to the actual attorneys fees and costs of prevailing party).

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 88-1622

HAROLD MANN and JEAN MANN,

Plaintiffs,

Filed April 12, 1990

Leonard Green, Clerk

JAMES THOMAS SLOAN, JR.; FREDRICK

J. FARRER; GARY C. NEWTON; SLOAN,
BENEFIEL, FARRER, NEWTON AND GLISTA;
and SLOAN, NEWTON and STEVENS,

Attorneys-Appellants,

v.

G & G MANUFACTURING, INC., a Nebraska corporation,
Defendant-Appellee.

Before: KEITH, JONES and GUY, Circuit Judges.

JUDGMENT

ON APPEAL from the United States District Court for the Western
District of Michigan.

THIS CAUSE came on to be heard on the record from the said
district court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and
adjudged by this court that the judgment of the said district court in this
case be and the same is hereby affirmed in part, reversed in part, and the
case is remanded not inconsistent with the opinion.

ENTERED BY ORDER OF THE COURT
Leonard Green, Clerk
/s/ Leonard Green
Clerk

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Deputy Clerk

No. 88-1622

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

HAROLD MANN; JEAN MANN,

Plaintiffs,

Filed May 24, 1990

Leonard Green, Clerk

JAMES THOMAS SLOAN, et al.,

Attorney-Appellants,

vs.

O R D E R

G & G MANUFACTURING, INC., etc.,

Defendant-Appellee,

HUTCHINSON DIVISION, LEAR SIEGLER, INC.,

A DELAWARE CORPORATION,

Defendant

BEFORE: KEITH, JONES and GUY, Circuit Judges.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for hearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/

Leonard Green, Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HAROLD MANN and JEAN MANN,
Plaintiff

Hon. Robert Holmes Bell
Case No. K84-71-CA4

v

G & G MANUFACTURING, INC.
a Nebraska corporation,
Defendants.

JUDGMENT FOR
COSTS AND
SANCTIONS

James Thomas Sloan, Jr. (P20583)
Fredrick J. Farrer (P25361)
Attorney for Plaintiffs

Mark H. Verwys (P23803)
Paul L. Nelson (P33605)
Attorneys for G & G Manufacturing
5650 Foremost Drive, S.E.
Grand Rapids, MI 49506-7081

At a session of said Court held in the Federal Building in the City
of Lansing, County of Ingham, State of Michigan, this 9th day of
May, 1988.

PRESENT: Hon. Robert Holmes Bell
U.S. District Judge

Defendant's Motion for Imposition of Costs and Sanctions was heard
on April 26, 1988. Prior to that hearing, this Court carefully reviewed the
entire court file. Based upon that review, this Court finds that Rule 11,

Fed. R. Civ. P. was violated by each attorney on behalf of plaintiffs, for the reasons more fully set forth in its oral opinion of April 26, 1988.

IT IS THEREFORE ORDERED that judgment for defendant's attorney fees and costs in the amount of Forty Thousand Four Hundred Eight-seven and 61/100 Dollars (\$40,487.61) is entered in favor of defendant G & G Manufacturing, Inc. and against attorneys James Thomas Sloan, Jr. (P20583), Fredrick J. Farrer (P25361) and Gary C. Newton (P29962), and against the law firms or former law firms of Sloan, Benefiel, Farrer, Newton & Glista and Sloan, Newton & Stevens, jointly and severally.

Hon. Robert Holmes Bell
U. S. District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HAROLD MANN and JEAN MANN,
Plaintiffs

File No. K84-71-CA4

v
HUTCHINSON DIVISION, LEAR
SIEGLER, INC., a Delaware
Corporation, and G & G
MANUFACTURING, INC., a
Nebraska corporation,

Defendants.

/

Motion for Imposition of Costs and Sanctions
Before

THE HONORABLE ROBERT HOLMES BELL
U. S. District Judge
April 26, 1988

PRESENT:

GARY C. NEWTON (P29962)
501 Comerica Building
Kalamazoo, MI 49007
Attorney for Plaintiffs

MARK H. VERWYS (P23803)
5650 Foremost Drive, S.E.
Grand Rapids, MI 49506-7081
Attorney for Defendant G & G
Manufacturing, Inc.

Kevin W. Gaugier, CSR-3065
U. S. District Court Reporter

office and me personally with the breakup, and this motion for costs against us added to that. I don't know who should bear the cost, if both Mr. Farrer and my firm or my firm or Mr. Farrer's firm, and I think perhaps that might be something that should be resolved latter if you rule that they're entitled to costs. Thank you.

THE COURT: Thank you.

MR. VERWYS: Let me respond to just three points.

THE COURT: Okay.

MR. VERWYS: The first is I don't think I ever said it was a weak case. I said it was a weak case when it started, and it got no better in the course of this. I think that's important because certainly the standard is different, it seems to me, when one starts a case when they don't know all the facts, and the other question is whether one has done sufficient pretrial inquiry. In this case, the Plaintiffs had done a substantial amount of inquiry before bringing G & G into this case and knew the they had weak case and nothing that happened thereafter made it any better.

Second of all, Mr. Newton referred to a guarded portion of the shaft. I think that this Court understand, as I understand this Court has something of a farm background that in this particular case there was never a guarded portion of the shaft. By definition, a partial guard remnant, this piece of plastic on one end of the shaft did not in any sense make is guarded shaft, and no one, not even the Plaintiff's experts, attempted to say that this shaft was a guarded shaft. It simply was not, and the only way they have a guarded shaft was to have a full and complete and functioning guard on the entire shaft.

THE COURT: If my memory serves me correctly from the testimony, isn't it that — and I want to make sure I get this factually understood — that the guard was done, but the bracket work upon which the guarded was to be hung was still there, wasn't it?

MR. VERWYS: No, sir. What there was was a cannibalizes shaft. Let's start with that.

THE COURT: Right, right.

MR. VERWYS: Put together, in fact, from two different manufacturers in joint.

THE COURT: Right.

MR. VERWYS: What there was — I wish I had brought my sample along. A complete guard has two telescoping sections.

THE COURT. Right.

MR. VERWYS: With the supporting bearings and races and so forth on each end.

THE COURT: Right.

MR. VERWYS: The only thing on this shaft was a broken-up piece, severely degraded by sunlight and so forth, of one end of the telescopic section. One telescopic section was totally gone, including the races, the bearings, everything was gone. What's left is this piece of plastic, about a half or a third of what was at one time one end of a guard. That had a bearing and a race, but the keeper spring, there's an expansion clip, was gone. So there was no way that what was left could ever possibly function as a guard. There was no way that it —

THE COURT: Just hanging there sustained.

MR. VERWYS: Just hanging there. It couldn't do what it was designed to do under any circumstances.

And not to argue against myself in terms of damages, but I think it's important also to point out that if we had gone to trial and gotten exactly the same result that we got by the voluntary dismissal, that we would be listing at least 17,000 to \$20,000 in costs because that's the amount that we've incurred since the mediation had been accepted. That's all I have.

THE COURT: Under Rule 11, as I'm sure very federal practitioner knows — and I notice the recent article in the Harvard Law Journal points up in excruciating detail, as well as the last issue of the Michigan Bar Journal, there is a specter of what I think is hysteria that's connected with the imposition of Rule 11 costs. Rule 11, when it is imposed, is to be imposed by just a full and fair reading of the Rule, which says, and I quote portions of it: "That to the best of the signer's knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of the existing law."

The Court believes, and has given this matter considerable thought, that any time Rule 11 is imposed, and this is the second time in eight months this Court is about to impose it, this Court must understand that it is exercising discretion, and that this exercise of discretion is to be tempered with a considerable amount of judicial self-restraining, giving the benefit of every reasonable, plausible doubt against the party whom Rule 11 sanctions are being requested. That is, this Court believes, the best alternative for the Court to approach these kinds of matters in.

This Court matter has been litigated at some length. It appears that

this Court should grant the motion for sanctions under Rule 11 for a number of reasons.

First, it should be concluded that it was not, in this Court's mind, well grounded in fact, nor is this Court of a mind to believe that reasonably inquiry would conclude that G & G manufactured the shaft or that they manufactured a guard which had any plausible connection with the injury. Therefore, it seems as point number one, that was not the necessary factual predicate to show the involvement of G & G. Albeit Hutchinson somewhat gratuitously indicated that it usually bought its shafts from G & G, et cetera, a careful inquiry would have quickly disclosed that G & G said that's not our shaft. It doesn't have our stampings, it doesn't have our configurations. That's not our shaft.

Secondly, and very importantly in this matter, G & G through their counsel quickly and consistently has argued look, it is not us. We are not involved. Maybe someone else, but not us. Get us out of it. They argued this continuously. This is not an after-the-fact issue. At final pretrial Counsel for the Defendant was considerably exercised about this exact fact. Therefore, it comes as no surprise to Counsel for the Plaintiff that the question of sanctions and the question of liability was raised right away.

Now, this is the great contradiction, and if this gets to the appellate court, I want the appellate court to know specifically the great distinction this is from 99.9 percent of other tort personal injury cases where General Motors or Remington Firearms or Classic Arms or one of these other defendant says yes, it was our product, but our product was not the proximate cause; or, in the cases of chemical pollutants where it's one of many, under a Michigan theory here that the appellate courts in Michigan are having a great deal of fun with, we are one of many manufacturers of this common toxic material and it could have been us. This is not that kind of a situation.

This a situation where a piece of machinery that apparently caused grievous injuries to this individual here, tragic injuries to this individual, was susceptible, this Court believes, to a determination as to manufacturer. If it was not susceptible to any determination as to who the manufacturer was, then we don't have a defendant. I know of no other manufacturing liability — products liability action that would come to any other conclusion.

Thirdly, very importantly, there appears to be significant issues raised by even Magistrates Karr and Brenneman, who both dealt somewhat

with this about the question of liability. Judicially, that question was raised, albeit Judge Gibson said it appears that the Plaintiff has alleged a cause of action which alleges issues of fact which should be left.

Fourthly, this Court finds that if in fact it can be said that the guard was owned by G & G or the guard was manufactured by G & G, all the evidence, all the evidence would demonstrate that the placement of the injury was not really related to the guard. Now, Plaintiff's counsel argued at I believe the final pretrial that, well, we might be able to show when the Plaintiff takes the witness stand, the Plaintiff will show that he may have fallen on the guard and then fallen on the shaft or some such argument as that. Somewhat speculative. All the discovery points to the fact that it was direct contact with the shaft that caused these horrendous injuries that we have before us which are so tragic to, obviously, a good person, a good farmer here. So therefore, this Court finds that even if we take this issue of G & G's potential manufacture of this partial shaft, that was not a good faith argument for liability, and Plaintiff knew that.

For this and a number of reasons, the Court finds that this was something different than a weak case. This is a case where liability was somewhere between zero and one percent, if even it rose to one percent. Now, does the Court have a responsibility? Well, the Court does because "well grounded in fact" has to have some reasonable interpretation. "Well grounded in fact" this Court interprets as a phrase to mean that there is a factual predicate that could be given to the jury, leaving aside conflicting evidence, leaving aside cross-examination, upon which a jury could, giving every reasonable doubt to this factual predicate, find some kind of liability. Now, applying reasonable belief to this case, I don't even find it meets that standard, unfortunately.

So, therefore, I'm going to impose costs and sanctions. This Court finds that the \$40,487.61 that is indicated is in fact a reasonable figure, and I concur that at the final pretrial conference Plaintiffs' counsel indicated that he and his firm had expended \$35,000 to that point. It's clear when I look at the entirety of this case that the heavy shouldering of the initial discovery appears to have been handled more even by the Defendant than the Plaintiff. So I sense in motion practice in this matter, the Defendant was carrying the lion's share of the groundwork. So were I to postulate as to which side spent more on costs and counsel fees, I clearly would have come to the conclusion that the Defendant had, even without seeing the figure. So I find \$40,000 is not unreasonable; or, said in its more positive

tone, it is reasonable, that the reasonable belief standard is applicable here. Now, to whom does this fall? Clearly, plaintiffs' counsel could have moved to withdraw if in fact it was the Plaintiff who had insisted that it was G & G. Plaintiffs' counsel could have sought protection from this Court, knowing, as Plaintiffs' counsel was in the unique position to know, that in fact costs and Rule 11 was applicable. I cannot impute the knowledge of Rule 11 to the client. I can certainly impute it to the counsel.

Therefore, this Court finds that costs and sanctions should fall upon all counsel who signed any pleadings in this matter, and obviously should fall on the partnerships and the corporate — professional corporate entities that entered appearances through one of the partners, shareholders, or associates connected with the representation of the Plaintiff. This Court believes that that's only fair. Lawyers enter partnerships and enter professional corporations for purposes. Those professional corporations assume certain liabilities, and under Rule 11 this Court believes that the liability should go to the partnerships and to the partners of this matter. It is for them among themselves, this Court believes, to allocate how much each or what entities are to pay what percentages. But this Court believes that a signature on any pleadings and/or appearance in any hearings related to this matter subject to those person or persons or entities to the shares — a share of the costs. So can I say it's imposed jointly and severally? I guess, for lack of a better term. I'll use the words joint and several as to all firms and counsel that are — that have been a party to this particular matter.

Counsel for the Plaintiff may prepare the appropriate order indicating specifically, if you would, that this Court is exercising its discretion based upon a review of the entire file.

Anything else, Mr. —

MR. VERWYS: You mean Counsel for the Defendant shall prepare the order.

THE COURT: Counsel for the Defendant. I'm sorry.

Anything else, Mr. Verwys?

MR. VERWYS: No, Your Honor.

THE COURT: Anything else, Mr. Newton?

MR. NEWTON: No, Your Honor, thank you.

THE COURT: Okay. Thank you, gentlemen. Thank you.

(Proceedings concluded at 10:50 a.m.)

FEDERAL RULE OF CIVIL PROCEDURE 11**Signing of Pleadings, Motions, and Other Papers; Sanctions**

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper, that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

FEDERAL RULE OF CIVIL PROCEDURE 56**Summary Judgment**

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the

action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) **For Defending Party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) **Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) **Case Not Fully Adjudicated on Motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) **Form of Affidavits; Further Testimony; Defense Required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party

may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) **When Affidavits are Unavailable.** Should it appear from the affidavits of a party opposing the motion that the part cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) **Affidavits Made in Bad Faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the part employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

WESTERN DISTRICT OF MICHIGAN RULE 19
Sanctions Affecting Counsel

(e) **Standard.** The standards of professional conduct of members of the bar of this Court shall include the current Code of Professional Responsibility of the American Bar Association. For a wilful violation of any of these canons in connection with any matter pending before this Court, an attorney may be subjected to appropriate disciplinary action.

WESTERN DISTRICT OF MICHIGAN RULE 42 MEDIATION

- (a) **Eligible Cases.** The Court may submit to mediation any civil action, or part thereof, not involving claims of constitutional rights.
- (b) **Manner of Selection of Cases.** A case may be selected for mediation:
 - (1) By stipulation of the parties with the approval of the Court;
 - (2) On motion of a party with notice to opposing party; or
 - (3) On the Court's own motion without notice to any party.
- (c) **Objection to Mediation Order on Court's Own Motion**
 - (1) Objection must be made by motion for reconsideration within ten-(10) days of the date of the Court's order.
 - (2) Copy of the motion for reconsideration is to be served on opposing counsel and on the Court.
 - (3) Mediation procedures are stayed pending decision on motion for reconsideration unless otherwise ordered by the Court.
- (d) **Mediation Panel**
 - (1) Mediation shall be by a panel of three (3) lawyers who reside in the Western District of Michigan and have at least five years of practice.
 - (2) The Mediation Clerk shall maintain a list of mediators which shall have a minimum of fifty (50) persons at all times and shall be updated from time to time in order to maintain said number. The Mediation Clerk shall select the attorneys to be included on the list of mediators in a manner directed by the Judges of the

Court. Copies of the list of mediators shall be retained by and shall be available at the office of the Mediation Clerk.

- (3) When a case has been submitted for mediation, the attorney for the plaintiff and the attorney for the defendant may each select one mediator from the list of mediators. The third mediator, who shall serve as chairman of the panel, shall be chosen by agreement of the respective attorneys. If the attorneys are not able to agree on the third mediator, said third mediator shall be selected by agreement of the first two mediators chosen; if they fail to agree on the selection of the third mediator, the Mediation Clerk shall select the third mediator; provided, however, that the judge assigned to the case may appoint the third mediator, and such appointee need not be on the list of attorneys and may include a Magistrate of this district.
- (4) If a mediator chosen by either party is unable or unwilling to serve on the particular case, then the attorney who selected him shall select another, or as many as is necessary to provide a mediator for the panel. If the third mediator chosen, either by agreement or by the Mediation Clerk, is unable or unwilling to serve, then either the attorneys for the parties or the Mediation Clerk, respectively, shall select another name from the list until the third mediator is selected.
- (5) In cases involving multiple parties, if the attorneys for either plaintiffs or defendants cannot agree among themselves on a particular mediator, then they shall propose one name from the list of mediators and the Mediation Clerk shall select from those names provided.
- (6) In cases involving multiple parties or multiple claims, the court may order an alternative method of selecting mediators.
- (7) Selection or designation of all mediators for a given panel shall be completed in accordance with the deadline as stated in the Mediation Order or within thirty (30) days of the order or stipulation submitting the case to mediation. If a party fails to notify the Mediation Clerk in writing of the selection of a mediator by the stated deadline, the Mediation Clerk will designate that party's mediator, and provide written notice to the parties. For good cause shown, a party may seek relief from this provision.

- (8) An award may be rendered by any two (2) of the three (3) mediators.
- (9) The Mediation Clerk shall be appointed by the Judges of the district .

(e) Procedure for Mediation

- (1) Time and place for hearing, notice. After a case has been assigned for mediation, the Mediation Clerk shall set the time and place for the hearing and send notice to the mediators and opposing counsel at least thirty (30) days before the date set.
- (2) Submission of documents. At least ten (10) business days before the hearing, all documents on questions of liability and damages shall be submitted to each mediator and opposing counsel, with proof of service to the Mediation Clerk. The documents shall include all medical reports, bills, records, photographs, and any other documents supporting the party's claim, including a summary or brief of factual and legal positions. Failure to submit the documents or the proof of service within the time designated shall result in costs of sixty (\$60) dollars being assessed, payable by separate checks in the amounts of twenty (\$20.00) dollars to each of the attorneys on the mediation panel and sent to the Mediation Clerk with the proof of service of the mediation document. If a Judge or Magistrate is a panel member, the fee remains the same; however, the checks shall be made payable in the amount of thirty (\$30.00) dollars to each of the other two mediators only. The panel shall make no award until it has received this fee. If any mediator shall waive these costs, they shall be paid into the court and treated as recovery of court costs .
- (3) Presence of parties, evidence. A party has the right, but is not required, to attend or be present at a mediation hearing. When scars, disfigurement or other unusual conditions exist, they may be demonstrated to the mediation panel by a personal appearance; however, no testimony shall be taken or permitted of any party.
- (4) Decision. Within ten (10) days after the hearing, the mediation panel shall notify in writing each counsel of its evaluation. The evaluation shall include all fees, costs and interest.

- (5) Action on mediation panel's decision. Written acceptance or rejection of the mediation panel's evaluation shall be given to the Mediation Clerk within twenty (20) days of the mailing of the evaluation. There shall be no disclosure of a party's acceptance or rejection until expiration of the twenty (20) days or until all parties have responded with an acceptance or rejection. Upon receipt of responses from all parties, the Mediation Clerk shall send a notice indicating each counsel's acceptance or rejection of the evaluation.
- (6) Preparation of Judgment. If the mediation panel's award is accepted by all parties, the plaintiff shall prepare a judgment, approved as to form by opposing counsel, for entry by the Court.

(f) Fees

- (1) Within ten (10) days after the mailing of the notice of the mediation hearing, the plaintiff and the defendant shall each send to the Mediation Clerk three (3) checks each in the amount of fifty (\$50.00) dollars and each payable to a separate attorney on the mediation panel. If a Judge or Magistrate is a panel member, the fee shall remain the same; however only two (2) checks shall be sent in by each party, each in the amount of seventy five (\$75.00) dollars and each made payable to one of the other two mediators. The Mediation Clerk shall mail or deliver the checks to the mediators on the day of the hearing.
- (2) Derivative claims (husband/wife, parent/child) shall be treated as one claim.
- (3) In the case of multiple injuries to members of a single family, the plaintiffs may elect to treat the case as involving one claim, with the payment of one fee and the rendering of one lump sum award to be accepted or rejected. If no such election is made, a separate fee must be paid for each plaintiff, and the mediation panel will then make separate awards for each claim, which may be individually accepted or rejected.
- (4) In the case of multiple parties, except in a case of derivative claims, each party shall pay the sum of one hundred fifty (\$150.00) dollars for each award. However, in those cases in which an attorney certifies at the time of paying the mediation

fee(s) that he/she represents multiple parties without conflict of interest and that there presently exists a substantial unity of interest between said parties on all issues, said parties may pay one fee. The mediation panel may make one lump sum award or separate awards to these parties, or a combination thereof, in its discretion, which shall be accepted or rejected in a lump sum or separately in the same manner as awarded.

- (5) For good cause shown, the Court may alter the amount which a party is to pay to a mediator.
- (6) Failure to pay the fees within the time designated shall result in additional costs of sixty (\$60.00) dollars being assessed, payable in the same manner as provided for in Section (e)(2). However, these costs shall be considered cumulative to any costs assessed pursuant to Section (e)(2). If any mediator shall waive these costs they shall be paid into the court and treated as recovery of court costs.

(g) Hearings

- (1) Time limits. Presentation to a mediation panel shall be limited to thirty (30) minutes a side unless there are multiple parties or unusual circumstances warranting additional time.
- (2) Settlement negotiations and insurance. The mediators may request information on the applicable insurance limits and the status of settlement negotiations.
- (3) Subsequent proceedings. Statements by counsel and the brief or summary are not admissible in any court or evidentiary proceeding.

(h) Adjournment of Hearing

- (1) Adjournments of mediation hearing may be had only for good cause shown upon motion to the Court.
- (2) When cases are settled or otherwise disposed of before the hearing date, it is the duty of counsel to notify The Mediation Clerk of the disposition of the case immediately.
- (3) If notice of the disposition of a case is given to the Mediation Clerk at least ten (10) days before the hearing date, the fees sent to the Mediation Clerk, and payable to the mediators, shall be returned. Otherwise, the Mediation Clerk shall forward the

checks to the mediators.

(i) **Evidence.** The rules of evidence do not apply before the mediation panel. Factual information having a bearing on the question of damages must be supported by documentary evidence whenever possible.

(j) **Effect of Mediation**

- (1) If the mediation panel's evaluation is not rejected by any of the parties within twenty (20) days, a judgment shall be entered by the Court in the amount of the evaluation.
- (2) If any party rejects the mediation panel's evaluation, the matter shall proceed to trial as the Court may direct. If the evaluation of the mediation panel is rejected, the Mediation Clerk shall place all mediation documents in a sealed envelope before forwarding them to the Clerk of the Court for filing. The envelope may not be opened in a nonjury case until the trial judge has rendered judgment. The penalty provisions set forth in subdivisions (j)(3), (4) and (5) of this Rule shall apply.
- (3) If the mediation panel's evaluation is unanimous and the defendant accepts the evaluation but the plaintiff rejects it and the matter proceeds to trial, the plaintiff must obtain a verdict in an amount which, when interest on the amount and costs from the date of filing of the complaint to the date of the evaluation are added, is more than ten (10) percent greater than the evaluation in order to avoid the payment of actual costs to the defendant.
- (4) If the mediation panel's evaluation is unanimous and the plaintiff accepts the evaluation but the defendant rejects it and the matter proceeds to trial, the defendant must obtain a verdict in an amount which, when interest on the amount and costs from the date of filing of the complaint to the date of the evaluation are added, is more than ten (10) percent less than the evaluation in order to avoid payment of actual costs to the plaintiff.
- (5) If the mediation panel's evaluation is unanimous and both parties reject the evaluation and the amount of the verdict, when interest on the amount and costs from the date of filing of the complaint to the date of the evaluation are added, is not more

than ten (10) percent above or below the evaluation, each party is responsible for its own costs from the mediation date. If the verdict is in an amount which, when interest on the amount and costs from the date of filing of the complaint to the date of the evaluation are added, is more than ten (10) percent above the evaluation, the defendant shall be taxed actual costs. If the verdict is in an amount which, when interest on the amount and costs from the date of filing of the complaint to the date of the evaluation are added, is more than ten (10) percent below the evaluation, the plaintiff shall be taxed actual costs.

- (6) For good cause shown, the Court may order relief from payment of any or all costs as set out in subsections (j)(3) through (j)(S), above.
- (7) In mediations involving multiple parties and/or claims the following rules apply:
 - (a) Each party has the option of accepting all of the awards covering the claims by or against that party or of accepting some and rejecting others. However, as to any particular claim, the party must either accept or reject the evaluation in its entirety.
 - (b) A party who accepts all of the awards may specifically indicate that he or she intends the acceptance to be effective only if all opposing parties accept. If this limitation is not included in the acceptance, an accepting party is deemed to have agreed to entry of judgment on those awards as to which all opposing parties accept, with the action to continue on the remaining outstanding claims between the accepting party and those opposing parties who reject.
 - (c) If a party makes a limited acceptance under subparagraph (j)(7)(b) and some of the opposing parties accept and others reject, for the purposes of the cost provisions of subparagraph (j) the party who made the limited acceptance is deemed to have rejected as to those opposing parties who accept.

(k) **Actual Costs.** Actual costs include those costs and fees taxable in any civil action and attorneys' fees for each day of trial as may be

determined by the Court.

(l) **Construction.** The term "Court" as used in this Rule means the Judge to whom the case has been assigned unless the context indicates otherwise. No provision in this Rule shall be construed to confer any right to mediation upon any litigant or to preclude the Court from altering any procedure when appropriate.

(m) **Northern Division.** There shall be no list of mediators maintained for, or Mediation Clerk assigned to, the Northern Division at Marquette. All eligible cases may, however, be selected for mediation pursuant to subdivision (b) of this Rule. When a case is so selected, the Court may make orders which it deems necessary concerning, but not limited to, the selection of mediators and the designation of a Mediation Clerk.

(n) **Effect on Trial Docket.** Selection of a case for mediation has no effect on the normal progress of the case toward trial.

ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY

CANON

**A Lawyer Should Represent a Client Zealously Within
the Bounds of the Law**

EC 7-4 The advocate may urge any permissible construction of the law favorable to his client, without regard to his professional opinion as to the likelihood that the construction will ultimately prevail. His conduct is within the bounds of the law, and therefore permissible, if the position taken is supported by the law or is supportable by a good faith argument for an extension, modification, or reversal of the law. However, a lawyer is not justified in asserting a position in litigation that is frivolous.

EC 7-26 The law and Disciplinary Rules prohibit the use of fraudulent, false, or perjured testimony or evidence. A lawyer who knowingly participates in introduction of such testimony or evidence is subject to discipline. A lawyer should, however, present any admissible evidence his client desires to have presented unless he knows, or from facts within his knowledge should know, that such testimony or evidence is false, fraudulent, or perjured.

MCL 600.2945; MSA 27A.2945

As used in sections 2946 to 2949 and section 5805, "products liability action" means an action based on any legal or equitable theory of liability brought for or on account of death or injury to person or property caused by or resulting from the manufacture, construction, design, formula, developments of standards, preparation, processing, assembly, inspection, testing, listing, certifying, warning, instructing, marketing, advertising, packaging, or labeling of a product or a component of a product.

MCL 600.2949; MSA 27A.2949

- (1) In all products liability actions brought to recover damages resulting from death or injury to person or property, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery by the plaintiff or the plaintiff's legal representatives, but damages sustained by the plaintiff shall be diminished in proportion to the amount of negligence attributed to the plaintiff.
- (2) If the court determines that the claim or defense is frivolous, the court may award costs and reasonable attorney's fees to the prevailing party in a products liability action.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HAROLD MANN AND JEAN MANN,
Plaintiffs,

vs.

File No. K84-71 CA4

HUTCHINSON DIVISION,
LEAR SIEGLER, INC.,
a Delaware corporation,
Defendant.

HON. Benjamin F. Gibson

EXCERPTS FROM
DEFENDANT'S ANSWERS TO SUPPLEMENTAL
INTERROGATORIES

4. Did the defendant, Hutchinson Division of Lear Siegler, Inc. manufacture and produce the "Hutchinson Portable Auger" in question? (Please see photograph of the Hutchinson Portable Auger" attached.)

ANSWER: The photographs appear to show an auger manufactured by Hutchinson.

9. Please state the month and Year that the "Hutchinson Portable Auger" in question was manufactured. (The "Hutchinson Portable Auger" is Model 8" Portable Auger, Serial No. 57-146888.

ANSWER: On or about April 18, 1980.

30. Please state the manufacturer or supplier of the orange plastic guard for the drive shaft of the "Hutchinson Portable Auger," if it is different than this defendant.

ANSWER: The photograph shows a drive shaft assembly that was not furnished by this defendant. It was obviously furnished by others.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HAROLD MANN and
JEAN MANN,

Plaintiffs,

vs.

Case No. K84-71 CA4

HUTCHINSON DIVISION,
LEAR SIEGLER INC.
a Delaware corporation,

Defendant.

EXCERPTS FROM
DEFENDANT'S ANSWER TO PLAINTIFFS'
SECOND SUPPLEMENTAL INTERROGATORIES

2. Defendant stated in answers to Plaintiffs' Supplemental Interrogatories that the photograph supplied to it by plaintiffs showed a drive shaft assembly that was not furnished by this defendant. Please state the following:
 - a. The name of the manufacturer or distributor who furnished the drive shaft in the photograph.
 - b. Does defendant manufacture drive shafts for same or similar models.
 - c. How are defendant's drive shafts different from what is shown in the photograph.

ANSWER:

- a. Unknown to this defendant.
- b. No.
- c. The end attached to the auger gear box has no hole for pin connection to the gear box shaft. Also see attached Addendum.

3. Please state the name of all the manufacturers or suppliers who supplied, furnished or produced the drive shaft for the defendant's product known as the Hutchinson portable auger, model #8, serial #57-146888.

ANSWER: G & G Mfg., Co.

5. Please list all manufacturers, producers and distributors of drive shafts that this defendant has ever incorporated into any of its augers.

ANSWER: I am not aware of any other than G & G Mfg. Co.

DATED: April 8, 1985.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

* * * * *

HAROLD MANN and JEAN MANN,

Plaintiffs,

vs.

File No. K84-71 CA4

HUTCHINSON DIVISION, LEAR
SIEGLER, INC., a Delaware
Corporation and G&g MANU-
FACTURING, INC., a Nebraska
Corporation,

AMENDED COMPLAINT

Defendants.

JAMES THOMAS SLOAN, JR. (P20583)
Attorney for Plaintiffs

NOW COMES the Plaintiffs Harold Mann and Jean Mann by and through their attorneys, Sloan, Benefiel, Farrer, Newton & Glista and for cause of action against the Defendants say:

COUNT I

1. The Plaintiffs Harold Mann and Jean Mann are husband and wife and are residents of the City of Constantine, County of St. Joseph, State of Michigan.
2. The Defendant Hutchinson Division, Lear Siegler, Inc., is a Delaware Corporation which division offices are located in Clay Center,

Kansas.

3. The matter in controversy exceeds the sum of TEN THOUSAND and 00/100 (\$10,000.00) dollars.

4. On November 9, 1982 the Plaintiff Harold Mann was severely injured while using the Defendant's product known as a "Hutchinson Portable Auger."

5. The "Hutchinson Portable Auger" was designed, manufactured, assembled and/or distributed by the Defendant.

6. The Defendant owed this Plaintiff the following duties and obligations among others:

a) To properly and adequately design, manufacture, test and inspect all portable augers for use on a farm;

b) To adequately and properly warn and instruct as to the safe use of the product known as the "Hutchinson Portable Auger";

c) To comply with all applicable rules, regulations, standards and laws regarding a portable auger;

d) To provide adequate labels, instructions and directions as to the use of said "Hutchinson Portable Auger";

e) To provide state of the art safety guards and mechanisms as to protect users of said "Hutchinson Portable Auger."

7. The Defendant did breach each and every one of the above-stated duties among others.

8. The said "Hutchinson Portable Auger" was designed, manufactured, assembled, sold and/or distributed with the implied warranty of fitness and merchantability and that said "Hutchinson Portable Auger" would be fit and safe for the purposes intended and for the purposes and uses foreseeable.

9. In addition to the aforementioned implied warranties of safety, fitness and merchantability, the Defendant also distributed said "Hutchinson Portable Auger" with the implied and expressed warranties and representations including but not limited to the following:

a) The "Hutchinson Portable Auger" could be used safely and

reliably equal to or exceeding the safety and reliability standards of comparable models sold by its competitors;

- b) Further warranties by way of printed and visual advertising extolling the characteristics of said "Hutchinson Portable Auger" and its degree of safety;
- c) Further warranties including but not limited to that the "Hutchinson products are provided with a full compliment of safety equipment";
- d) Further warranties, more specifically but not limited to that "Hutchinson Augers" match or exceed the performance of any other auger on the market;
- e) Further warranties, more specifically but not limited to, that "Hutchinson Auger's" use of materials that provide greater strength and longer life to the "Hutchinson Portable Auger".

10. The Defendant breached the above warranties in that the "Hutchinson Portable Auger" was defective in the manufacture and/or design at the time it left the Defendant's possession in the following particulars:

- a) The "Hutchinson Portable Auger" was not reasonably fit and safe for the purposes intended due to its failure to have a safety guard in and about the drive shaft which would last the life of the auger;
- b) The plastic guard provided to ensure the safe operation of the "Hutchinson Portable Auger" at or near the drive shaft was subject to environmental deterioration which produced surface deterioration leading to mechanical deterioration and eventual fracture and failure of the plastic guard;
- c) In failing the design a plastic guard in and about the drive shaft which would be permanent and not easily removed to ensure the safe operation of said portable auger;
- d) In designing the guard in and about the drive shaft from a

material that was known to be subject to environmental and mechanical deterioration and a material not suitable for the intended uses of the same;

e) The "Hutchinson Portable Auger" was improperly designed and constructed and did not meet the standards as imposed by the American Society of Agricultural Engineers pertaining to the guarding of drive shafts in power take-offs;

f) In guarding the drive shaft with a material which was manufactured or eventually developed a sand-paper like outer surface to the plastic shield which increases the probability of catching clothing on the shield itself;

g) In designing a shield or guard mechanism that rotates causing a condition which is as inherently dangerous as the moving drive shaft itself;

h) By designing a shield or guarding mechanism in two removable parts which allows the drive shaft to be operated with one end of the shield in place and the other removed causing even a greater danger than if the drive shaft was unprotected;

i) In designing the drive shaft itself with a defect which presented an area which was highly subject to catching clothing which may have come into contact with it.

11. As a proximate result of the Defendant's wilful and wanton misconduct and failing to remove the "Hutchinson Portable Auger" from the stream of Commerce which it knew or should have known was possessed with dangerous qualities, the Plaintiffs have suffered outrage, indignation and shock due to such aggravated misconduct.

12. By virtue of the aggravated misconduct described above, the Plaintiffs, pray for an award of exemplary damages against the Defendant.

13. As a proximate result of the Defendant's breach of the aforesaid implied and expressed warranties and representations and as a proximate result of the Defendant's negligence, gross negligence and wilful and wanton misconduct, the Plaintiff Harold Mann suffered the following personal injuries and damages:

- a) Personal injuries to and about Plaintiff's head, neck, back, shoulder, arms and legs including but not limited to an open comminuted fracture with massive soft tissue injury to the left lower leg with fractures of the left tibia and fibula, comminuted open compound trimalleolar fracture of the right ankle, fracture of the right oscalcis, comminuted fracture of the left proximal femur and femoral neck, blunt head injury, a delayed healing of the tibial bone fracture site, all of which required debridement, vascular repair, skin grafts, traction, pinning, closed manipulations and reductions, catheterizations, long convalescence and several surgeries;
- b) Pain and suffering including pain resulting from the above-stated injuries as well as surgical procedures, emotional distress, all of which has been in the past and will be in the future;
- c) Disability including impaired earning capacity and wage loss resulting from said injuries;
- d) Interference with Plaintiff's usual and normal social activities and pleasures;
- e) Disfigurement, humiliation and embarrassment both past and future;
- f) Past, present and future hospital, medical and surgical expenses;
- g) Plaintiff's injuries are permanent.

14. As a direct and proximate result of the aforementioned breach of implied warranties as well as expressed warranties and negligence of the Defendant the Plaintiff, Jean Mann has sustained damages in the nature of loss of comfort, society, services, love, affection and loss of consortium of her husband and will sustain a future loss of the same.

WHEREFORE, Plaintiff Harold Mann claims Judgment against the Defendant in a sum of TWO MILLION FIVE HUNDRED THOUSAND DOLLARS OR 2.5 MILLION DOLLARS, together with costs of this Court, interest from the date of filing this Complaint and reasonable attorney fees and Plaintiff Jean Mann claims Judgment against the

Defendant in the sum of FIVE HUNDRED THOUSAND (\$500,000.00) dollars, together with costs, interest and attorney fees from the date of filing this Complaint.

COUNT II

1. The Plaintiffs Harold Mann and Jean Mann are husband and wife and are residents of the City of Constantine, County of St. Joseph, State of Michigan.

2. The Defendant G&G Manufacturing, Inc. is a Nebraska Corporation which offices are located in the City of Omaha, State of Nebraska.

3. The matter in controversy exceeds the sum of TEN THOUSAND AND 00/100 (\$10,000.00) dollars.

4. On November 9, 1982, the Plaintiff Harold Mann was severely injured while using the Defendant's product known as the drive shaft of a Hutchinson Portable Auger.

5. The drive shaft of the Hutchinson Portable Auger in question was designed, manufactured, assembled and/or distributed by this Defendant.

6. The Defendant owed this Plaintiff the following duties and obligations, among others:

a) To properly and adequately design, manufacture, test and inspect all drive shafts for uses on portable augers for use on a farm;

b) To adequately and properly warn and instruct as to the safe use of the product known as the drive shaft for portable augers;

c) To comply with all applicable rules, regulations, standards and laws regarding drive shafts for portable augers;

d) To provide adequate labels, instructions and directions as to the use of drive shafts for portable augers;

e) To provide state of the art safety guards and mechanisms to protect users of said drive shaft for portable augers.

7. The Defendant did breach each and every one of the above-stated

duties, among others.

8. That said drive shaft for the portable auger was designed, manufactured, assembled, sold and/or distributed with the implied warranty of fitness and merchantability and that said drive shaft for the portable auger would be fit and safe for the purposes intended and for the purposes and uses foreseeable.

9. In addition to the aforementioned implied warranties of safety, fitness and merchantability, the Defendant also distributed said drive shaft with the implied and expressed warranties and representations including but not limited to the following:

- a) The G&G drive shaft could be used safely and reliably equal to or exceeding the safety and reliability standards of comparable models sold by its competitors;
- b) Further warranties by way of printed and visual advertising extolling the characteristics of said G&G drive shaft and its degree of safety;
- c) Further warranties including but not limited to that the G&G Manufacturing drive shaft are provided with a full compliment of safety equipment";
- d) Further warranties, more specifically but not limited to that G&G Manufacturing drive shaft matches or exceeds the performance of any other drive shaft for portable augers on the market;
- e) Further warranties, more specifically but not limited to, that the G&G Manufacturing drive shaft use of materials that provide greater strength and longer life to the G&G Manufacturing drive shafts for portable augers.

10. The Defendant breached the above warranties in that the G&G Manufacturing drive shaft was defective in the manufacture and/or design at the time it left the Defendant's possession in the following particulars:

- a) The G&G drive shaft for portable augers was not reasonably fit and safe for the purposes intended due to its failure to have a safety guard in and about the drive shaft which would last the life

of the auger;

- b) The plastic guard provided to ensure the safe operation of the G&G Manufacturing drive shaft was subject to environmental deterioration which produced surface deterioration leading to mechanical deterioration and eventual fracture and failure of the plastic guard;
- c) In failing the design a plastic guard in and about the drive shaft which would be permanent and not easily removed to ensure the safe operation of said portable auger;
- d) In designing the guard in and about the drive shaft from a material that was known to be subject to environmental and mechanical deterioration and a material not suitable for the intended uses of the same;
- e) The G&G Manufacturing drive shaft was improperly designed and constructed and did not meet the standards as imposed by the American Society of Agricultural Engineers pertaining to the guarding of drive shafts in power take-offs;
- f) In guarding the drive shaft with a material which was manufactured or eventually developed a sand-paper like outer surface to the plastic shield which increased the probability of catching clothing on the shield itself;
- g) In designing a shield or guard mechanism that rotates causing a condition which is as inherently dangerous as the moving drive shaft itself;
- h) By designing a shield or guarding mechanism in two removable parts which allows the drive shaft to be operated with one end of the shield in place and the other removed causing even a greater danger than if the drive shaft was unprotected;
- i) In designing the drive shaft itself with a defect which presented an area which was highly subject to catching clothing which may have come into contact with it.
- j) In failing to design a guard for the drive shaft out of a

metallic substance which would have a longer life expectancy and would protect users of the same for the life of the drive shaft.

11. As a proximate result of the Defendant's wilful and wanton misconduct and failing to remove the G&G Manufacturing drive shaft from the stream of Commerce which it knew or should have known was possessed with dangerous qualities, the Plaintiffs have suffered outrage, indignation and shock due to such aggravated misconduct.

12. By virtue of the aggravated misconduct described above, the Plaintiffs, pray for an award of exemplary damages against the Defendant.

13. As a proximate result of the Defendant's breach of the aforesaid implied and expressed warranties and representations and as a proximate result of the Defendant's negligence, gross negligence and wilful and wanton misconduct, the Plaintiff Harold Mann suffered the following personal injuries and damages:

- a) Personal injuries to and about Plaintiff's head, neck, back, shoulder, arms and legs including but not limited to an open comminuted fracture with massive soft tissue injury to the left lower leg with fractures of the left tibia and fibula, comminuted open compound trimalleolar fracture of the right ankle, fracture of the right oscalcis, comminuted fracture of the left proximal femur and femoral neck, blunt head injury, a delayed healing of the tibial bone fracture site, all of which required debridement, vascular repair, skin grafts, traction, pinning, closed manipulations and reductions, catheterizations, long convalescence and several surgeries;
- b) Pain and suffering including pain resulting from the above-stated injuries as well as surgical procedures, emotional distress, all of which has been in the past and will be in the future;
- c) Disability including impaired earning capacity and wage loss resulting from said injuries;
- d) Interference with Plaintiff's usual and normal social activities and pleasures;
- e) Disfigurement, humiliation and embarrassment both past and future;

- f) Past, present and future hospital, medical and surgical expenses;
- g) Plaintiff's injuries are permanent.

14. As a direct and proximate result of the aforementioned breach of implied warranties as well as expressed warranties and negligence of the Defendant the Plaintiff, Jean Mann has sustained damages in the nature of loss of comfort, society, services, love, affection and loss of consortium of her husband and will sustain a future loss of the same.

WHEREFORE, Plaintiff Harold Mann claims Judgment against the Defendant in a sum of TWO MILLION FIVE HUNDRED THOUSAND DOLLARS OR 2.5 MILLION DOLLARS, together with costs of this Court, interest from the date of filing this Complaint and reasonable attorney fees and Plaintiff Jean Mann claims Judgment against the Defendant in the sum of FIVE HUNDRED THOUSAND (\$500,000.00) dollars, together with costs, interest and attorney fees from the date of filing this Complaint.

Dated: 6-14-85

SLOAN, BENEFIEL, FARRER,
NEWTON & GLISTA
By: /s/ Fredrick J. Ferrer
Fredrick J. Ferrer
501 Comerica Building
151 South Rose Street
Kalamazoo, MI 49007
(616) 382-5830

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

HAROLD MANN and JEAN MANN,

Plaintiffs,

File No. K84-71 CA4

vs.

Hon. Benjamin F. Gibson

HUTCHINSON DIVISION, LEAR
SIEGLER, INC., a Delaware
Corporation and G&g MANU-
FACTURING, INC., a Nebraska
Corporation,

ANSWER AND
AFFIRMATIVE
DEFENSES TO AMENDED
COMPLAINT

Defendants.

James Thomas Sloan, Jr. (P20583)
Attorney for Plaintiffs

Mark H. Verwys (P23803)
Paul L. Nelson (P33605)
Attorneys for Defendant
G & G Manufacturing, Inc.

R. Curtis Mabbitt
Attorney for Defendant Hutchinson

Defendant G & G Manufacturing, Inc. (hereinafter "G & G"), by its attorneys Tolley, Fisher & Verwys, P.C., answers plaintiffs' amended complaints and states as follows:

COUNT I

G & G neither admits nor denies the allegations contained in paragraphs 1 through 13 of Count I for the reason that these allegations pertain to a defendant other than G & G.

COUNT II

1. G & G neither admits nor denies the allegations contained in paragraph 1 for the reason that its is without sufficient information as to form a belief.

2. G & G admits the allegations contained in paragraph 2.

3. G & G admits the allegations contained in paragraph 3.

4. On information and belief, G & G admits the allegations contained in paragraph 4.

5. G & G neither admits nor denies the allegations contained in paragraph 5 for the reason that it is without sufficient information as to form a belief;

6. G & G neither admits nor denies the allegations contained in paragraph 6 for the reason that they state conclusions of law to which no response is necessary.

7. G & G denies the allegations contained in paragraph 7 for the reason that they are untrue.

8. G & G neither admits nor denies the allegations contained in paragraph 8 for the reason that they state conclusions of law to which no response is required.

9. G & G neither admits nor denies the allegations contained in paragraph 9 for the reason that they state conclusions of law to which in response is required.

10. G & G denies the allegations contained in paragraph 10 for the reason that they are untrue.

11. G & G denies the allegations contained in paragraph 11 for the reason that they are untrue.

12. To the extent that the allegations contained in paragraph 12 allege any aggravated misconduct on the part of G & G they are denies for the reason that they are untrue. G & G neither admits nor denies the remaining allegations contained in paragraph 12 for the reason that no response is required.

13. G & G denies the allegations contained in paragraph 13 for the reason that they are untrue.

14. G & G denies the allegations contained in paragraph 14 for the reason that they are untrue.

WHEREFORE, defendant G & G Manufacturing, Inc. respectfully requests that the Court enter a judgment of no cause of action in its favor and against plaintiffs and dismiss plaintiffs' complaints as to this defendant with prejudice and award to this defendant its costs and reasonable attorneys fees incurred in defense of this action.

TOLLEY, FISHER & VERWYS, P.C.
Attorneys for Defendant
G & G Manufacturing, Inc.

Dated: October 8, 1985

By: /s/
Mark H. Verwys (P23803)

Dated: October 8, 1985

By: /s/
Paul L. Nelson (P33605)
Business Address:
5650 Foremost Drive, S.E.
Grand Rapids, MI 49506-7081
Telephone: (616) 942-8090

AFFIRMATIVE DEFENSES

1. Some or all of plaintiffs' injuries were proximately caused or contributed to by plaintiff Harold Mann's negligence and plaintiffs' damages, if any, should be reduced by the proportionate share of Harold Mann's own negligence.

2. Some or all of plaintiffs' injuries were proximately caused or contributed to by persons or entities not party to this action and plaintiffs' damages, if any, should be reduced by the proportionate share of such negligence.

3. Plaintiffs have failed to state a claim upon which relief can be granted as to this defendant.

4. G & G Manufacturing, Inc. reserves the right to file additional or

amended affirmative defenses during or upon completion of discovery in this matter.

WHEREFORE, defendant G & G Manufacturing, Inc respectfully requests that this Court enter a judgment of no cause of action in its favor and against plaintiffs and dismiss plaintiffs' complaints as to this defendant with prejudice and award to this defendant its costs and reasonable attorneys fees incurred in defense of this action.

TOLLEY, FISHER & VERWYS, P.C.
Attorneys for Defendant
G & G Manufacturing, Inc.

Dated: October 8, 1985

By: /s/ Mark H. Verwys
Mark H. Verwys (P23803)

Dated: October 8, 1985

By: /s/ Paul L. Nelson
Paul L. Nelson (P33605)
Business Address:
5650 Foremost Drive, S.E.
Grand Rapids, MI 49506-7081
Telephone: (616) 942-8090

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

* * * * *

HAROLD MANN and JEAN MANN,
Plaintiffs,

vs.

File No. K84-71 CA4

HUTCHINSON DIVISION, LEAR
SIEGLER, INC., a Delaware
Corporation and G&G
MANUFACTURING, INC.,
a Nebraska Corporation,
Defendants.

JAMES THOMAS SLOAN, JR. (P20583)
Attorney for Plaintiffs

ROBERT C. MABBITT, JR. (P24844)
Attorney for Defendant Hutchinson

MARK H. VERWYS (P23803)
Attorney Defendant G & G Mfg.

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANT
G&G's MOTION FOR SUMMARY JUDGMENT

[EXCERPT]

STATEMENT OF FACTS

Defendant G & G Manufacturing Company (G&G) moves for Summary Judgment claiming it is entitled to judgment as a matter of law and fact. This brief is in opposition to Defendant's motion.

Defendant claims that it is entitled to summary judgment because 1) it did not make the drive shaft, (2) that the plastic guard manufactured by G&G had been modified, 3) that G&G breached no duty to Harold Mann because there is not duty to guard or warn against dangers which are open and obvious, and 4) that the sole cause of Harold Mann's injuries was his own negligence in that he "voluntarily and unreasonably encountered a known risk."

In response to these claims, Plaintiff will show in this brief 1) that G&G remains liable even if the guard were modified, as a manufacturer is liable for defective products that are modified or misused if such modification is misuse is foreseeable, 2) that the open and obvious nature of the defective products does not negate a manufacturer's duty, and 3) that Harold Mann did not "voluntarily and unreasonably encounter a known risk."

Plaintiff cannot, at this time, show that Defendant G&G had anything to do with the manufacture of the drive shaft. This is of little significance, however, since the primary cause of this accident is the defective nature of the guard which is supposed to guard persons from the drive shaft. More specifically, the guard was defective in the following

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

* * * * *

HAROLD MANN & JEAN MANN,
Plaintiffs,

vs.

File No. K84-71 CA4

HUTCHINSON DIVISION, LEAR
SIEGLER, INC.,
a Delaware Corporation
and
G&G MANUFACTURING, INC.,
a Nebraska Corporation,
Defendants.

Before

THE HONORABLE BENJAMIN F. GIBSON

U.S. District Judge

Grand Rapids, Michigan
April 9, 1987
Motion Hearing

TRANSCRIPT

This is a transcript of the opinion of the Judge as rendered from the Bench this day, April 9, 1987.

DIANE CALSBEEK, COURT REPORTER Grand Rapids, Michigan

April 9, 1987
Court's Opinion from Bench

PROCEEDING:

THE COURT: The Court is not inclined to grant any additional discovery in this matter. The matter has been reviewed on at least two occasions by two different magistrates. I have reviewed the matter on one other occasion at least, and now we're taking another look at this matter now. And it appears that in spite of the discovery that the plaintiff has had to date, he is unable to find any evidence that either defendant is connected with the shaft that's in question here.

Judge Brenneman has indicated that he has reviewed certain testimony in the form of depositions and other documents, and he was of the opinion that the overwhelming evidence was that the shaft in question was not manufactured by either defendant.

There is no evidence after a review of the depositions and other documents as reviewed by Judge Brenneman which indicates that either defendant did manufacture that shaft. Mr. Newton has indicated that he has no evidence that they did manufacture the shaft, but he thinks there might be some evidence out there which might indicate that they did.

Judge Brenneman found additional discovery in this matter would be oppressive and unduly burdensome upon the defendant Hutchinson. The Court is of the opinion that that is the case with respect to both defendants.

The matter is scheduled for trial. The case is a 1984 case, some three years old now. The plaintiff still has no evidence of the origin of the shaft in question. The time has come that we close discovery and try this case if that is what will be done. So, therefore, the Court adopts the recommendations and the order of Judge Brenneman with respect to the matter of discovery.

Judge Brenneman granted a protective order with respect to the defendant Hutchinson. The Court affirms that action. The Court further determines that any additional discovery will not be permitted for any of the parties. Discovery is closed.

Regarding the question of the motion for summary judgment for Defendant Hutchinson, as the Court has indicated and as apparently

acknowledged by Mr. Newton, there is no evidence that the defendant Hutchinson had anything to do with or was connected with or manufactured the shaft in question. To the extent that there is a claim that the shaft is in some way defective, which may or may not be the case, but even if it were the case, there is no evidence that Defendant Hutchinson was connected with that shaft. This has been acknowledged by Mr. Newton on the record.

And since one of the elements of a claim against Hutchinson is to show that Hutchinson in some way impliedly warranted the product that was allegedly defective or Hutchinson was in some way connected with the defective product, that evidence is lacking because there is no evidence that Hutchinson was even involved with that part. Therefore, motion for summary judgment with respect to Hutchinson is granted.

Mr. Mabbitt would you prepare an order to that effect?

MR. MABBITT: Yes, Your Honor. Thank you.

THE COURT: With respect to the question of the liability of G & G, Inc. there is a factual dispute as to the manufacture of the shaft in question. There is some evidence which tends to indicate that G & G is connected with the — I said the shaft, I mean the guard — a factual dispute with regard to the guard in question. There is some evidence which tends to indicate that G & G is connected with or did manufacture the guard in question. There is a theory that the guard which remained on the shaft deteriorated because of the elements and, as a consequence, was in some way responsible for this accident. There is also a theory that the portion of the shaft is — the design of the guard in question is such that it is able to separate; and, by separating, that exposed the shaft which may have been the situs of the accident.

The Court is of the opinion that with respect to the matter of Defendant G & G, there is a factual dispute that would preclude the granting of a summary judgment motion; and, therefore, the motion for summary judgment is denied.

This matter is scheduled for trial I think beginning the 21st of April. Is that not true?

MR. MABBITT: Yes, sir. This matter I believe is the Number 1 case now.

THE COURT: Mr. Newton, are you ready to go forward?

MR. NEWTON: Yes, Your Honor.

THE COURT: Mr. Nelson?

MR. NELSON: Yes, Your Honor.

THE COURT: I would ask you to check with the assignment clerk to determine what your status is on the docket.

The fact that the Court has denied the motion for summary judgment — it's been based upon the record before it as of now. This does not preclude the Court after presentation of evidence, from granting a motion for directed verdict after I've heard the evidence.

Mr. Newton, prepare an order denying the motion for summary judgment with respect to G & G Manufacturing.

MR. NEWTON: Very well.

THE COURT: Thank you.

MR. NEWTON: Thank you, Your Honor.

MR. NELSON: Thank you.

REPORER'S CERTIFICATE

I, Diane C. Calsbeek, Office Court Reporter for the United States District Court for the Western District of Michigan, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a full, true and correct transcript of the Judge's opinion from the Bench in the within entitled and numbered cause on the date hereinbefore set forth; and I do further certify that the foregoing transcript has been prepared by me or under my direction.

Diane C. Calsbeek, CSR-RPR
U.S. District Court Reporter
606 Federal Building
Grand Rapids, Michigan 49503

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HAROLD MANN and JEAN MANN,
Plaintiffs,

vs.

File No. K84-71 CA4

HUTCHINSON DIVISION, LEAR
SIEGLER, INC., a Delaware
Corporation and G&g MANU-
FACTURING, INC., a Nebraska
Corporation,
Defendants.

HON. BENJAMIN F. GIBSON

REPORT OF MEDIATORS

This matter have been heard in Mediation on February 16, 1987 and the Mediators having unanimously agreed on entry of an award.

A MEDIATION AWARD in favor of Plaintiffs against G & G Manufacturing, Inc. in the amount of \$37,500.00 including all fees, costs and interest is hereby entered.

A MEDIATION AWARD against Hutchinson Division, Lear Siegler, Inc., of no-cause of action is hereby entered.

Dated: 2-19-87

/s/ Richard J. Howard

Richard J. Howard
Administrative Mediator
BUSINESS ADDRESS:
400 Kalamazoo Building
Kalamazoo, MI 49007
(616) 382-1483

cc: Mark A. Zarbock
William W. Jack
Fredrick J. Farrer
Mark Verwys
Robert Mabbitt

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

* * * * *

HAROLD MANN and JEAN MANN,
Plaintiffs,

vs.

File No. K84-71 CA4

HUTCHINSON DIVISION, LEAR
SIEGLER, INC., a Delaware
Corporation and G&g
MANUFACTURING, INC.,
a Nebraska Corporation,
Defendants.

JAMES THOMAS SLOAN, JR. (P20583)
Attorney for Plaintiffs

ROBERT C. MABBITT, JR. (P24844)
Attorney for Defendant

MARK H. VERWYS (P23803)
Attorney for Defendant G&G Mfg.

REJECTION OF MEDIATION AWARD

PLEASE TAKE NOTICE that Plaintiffs in the above-captioned matter
reject the mediation award, dated February 19, 1987.

Dated: February 23, 1987

SLOAN, BENEFIEL, FARRER
NEWTON & GLISTA
By: /s/ Fredrick J. Farrer
Fredrick J. Farrer

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

* * * * *

HAROLD MANN and JEAN MANN,
Plaintiffs,

vs.

File No. K84-71 CA4

HUTCHINSON DIVISION, LEAR
SIEGLER, INC., a Delaware
Corporation and G&g MANU-
FACTURING, INC., a Nebraska
Corporation,

Defendants.

**NOTICE OF WITHDRAWAL
MEDIATION REJECTION**

JAMES THOMAS SLOAN, JR. (P20583)
Attorney for Plaintiffs

MARK H. VERWYS (P23803)
Attorney for Defendants G&G Mfg.

NOW COMES the Plaintiffs, Harold Mann and Jean Mann, by and through their attorneys, Sloan, Benefiel, Farrer, Newton & Glista, and as of this date, rescind their notice of rejection of the mediation award (said award being dated 2/19/87) and hereinafter accepts the mediation award of \$37,500.00.

Pursuant to the above-stated acceptance, the Plaintiffs have prepared a judgment, a copy of which is attached, original being sent to opposing counsel for approval as to form.

Dated: April 24, 1987

SLOAN, BENEFIEL, FARRER

NEWTON & GLISTA

Attorneys for Plaintiff

By: /s/ Fredrick J. Farrer

Fredrick J. Farrer

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HAROLD MANN and JEAN MANN,
Plaintiffs, File No. K84-71 CA4

vs. Hon. Benjamin F. Gibson

HUTCHINSON DIVISION, LEAR
SIEGLER, INC., a Delaware
Corporation and G&g MANU-
FACTURING, INC., a Nebraska
Corporation,

Defendants.

DEFENDANT G & G MANU-
FACTURING'S OBJECTION TO
PLAINTIFFS' NOTICE OF
WITHDRAWAL OF
MEDIATION REJECTION;
MOTION TO STRIKE AND
MEMORANDUM OF LAW IN
SUPPORT THEREOF

James Thomas Sloan, Jr. (P20583)
Frederick J. Farrer (P25361)
Attorney for Plaintiffs

Robert C. Mabbitt, Jr. (P24844)
Attorney for Defendant

Mark H. Verwys (P23803)
Paul L. Nelson (P33605)
Attorneys for Defendant
G & G Manufacturing, Inc.
5650 Foremost Drive, S.E.
Grand Rapids, MI 49506-7081
(616) 942-8090

Defendant G & G Manufacturing Company, Inc. (hereinafter "G & G"), by its attorneys, Tolley, Fisher & Verwys, P.C., pursuant to W. D.

Mich. R. 42, objects to Plaintiffs' notice of withdrawal of mediation rejection. G & G also moves to strike the notice of withdrawal of mediation rejection. The objection and motion are based on the records and pleadings on file in this matter as well as the attached memorandum of law.

MEMORANDUM OF LAW

This matter was mediated on February 19, 1987. On that date, the mediation panel unanimously recommended an award in favor of plaintiffs and against G & G, the amount of which now has been disclosed by plaintiffs' counsel in violation of W. D. Mich. R. 42(j)(2). Pursuant to W. D. Mich. R. 42(e)(5), written acceptance or rejection of the evaluation was required within 20 days. Plaintiffs rejected the evaluation while G & G and Hutchinson accepted it.

Since the mediation, G & G has incurred substantial attorney fees and expenses, primarily due to plaintiffs' actions. Since the mediation, G & G's counsel has been required to attend depositions noticed by plaintiffs in Lansing, Kalamazoo and Three Rivers, Michigan, Omaha, Nebraska, and Cedar Falls, Iowa. The trip to Omaha required G & G's counsel to spend two days in Omaha in order to appear at the depositions of G & G personnel. This additional activity has done substantial damage to plaintiffs' already weak liability situation.

In addition, because plaintiffs rejected the mediation award, G & G was required to prepare this matter for trial. As the Court is aware, this matter originally was scheduled for trial commencing April 21, 1987, but since has been adjourned to November, 1987. In order to prepare this matter for trial, it was necessary for G & G to retain expert witnesses, prepare its trial brief, jury instructions and proposed voir dire, and prepare its expert and fact witnesses for trial. This activity resulted in additional costs and attorney fees for G & G.

In light of the above, the circumstances which existed at the time of the mediation have changed materially. The mediation panel's decision would undoubtedly have resulted in a lower award, if any of all, had the most recent liability information been available. G & G's acceptance of the mediation award was based, in part, on its hope to avoid incurring additional costs and expenses in defending this matter. Obviously, plaintiffs' rejection of the mediation award prevented that hope from

becoming reality.

Pursuant to W. D. Mich. R. 42(j)(2), once a party rejects the mediation evaluation, "the matter shall proceed to trial as the Court may direct." Plaintiffs rejected the mediation evaluation and the matter must proceed to trial. Defendant G & G Manufacturing Company therefore requests that the Court strike plaintiffs' notice of withdrawal of mediation rejection.

After plaintiffs rejected the mediation evaluation, they became liable for payment of G & G's actual costs should G & G obtain a verdict substantially less than the amount of the award. It appears that plaintiffs now are attempting to avoid the burden which goes with their decision to reject the mediation evaluation. It would be unconscionable to require G & G to be bound by its acceptance of the mediation evaluation after circumstances have changed so materially. It would be equally unfair to allow plaintiffs to avoid their responsibility under the mediation rule by accepting the mediation evaluation more than two months after the mediation and long after they specifically rejected it.

For all of the above reasons, defendant G & G Manufacturing Company, Inc., requests that plaintiffs' notice of withdrawal of mediation rejection be stricken.

TOLLEY, FISHER & VERWYS, P.C.
Attorneys for Defendant G & G

Dated: April 28, 1987

By: /s/ Mark H. Verwys
Mark H. Verwys (P23803)

By: /s/ Paul L. Nelson
Paul L. Nelson (P33605)
Business Address:

5650 Foremost Drive, S.E.
Grand Rapids, MI 49506-7081
Telephone: (616) 942-8090

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HAROLD MANN and JEAN MANN,

Plaintiffs,

File No. K84-71 CA4

vs.

HUTCHINSON DIVISION, LEAR
SIEGLER, INC., a Delaware
Corporation and G&g MANU-
FACTURING, INC., a Nebraska
Corporation,

Defendants.

James Thomas Sloan, Jr. (P20583)
Attorney for Plaintiffs

Robert C. Mabbitt, Jr. (P24844)
Attorney for Defendant

Paul L. Nelson (P33605)
Attorney for G & G Mfg.
5650 Foremost Drive, S.E.
Grand Rapids, MI 49506-7081
(616) 942-9080

At a session of said Court held in the Federal Building, City of Grand Rapids, County of Kent, State of Michigan, this 24th day of June, 1987.

PRESENT:

Hon. Hugh W. Brenneman, Jr.
United States Magistrate

This matter having come before the Court on Defendant G & G Manufacturing's Motion to Strike Plaintiffs' Notice of Withdrawal of Mediation Rejection, the Court having heard argument on June 1, 1987, and otherwise being fully advised in the premises,

IT IS HEREBY ORDERED, for the reason stated on the record on June 1, 1987, that the Motion to Strike Plaintiffs' Notice of Withdrawal of Mediation Rejection is granted.

/s/ Hugh W. Brenneman, Jr.

Hon. Hugh W. Brenneman, Jr.
United States Magistrate

APPROVED AS TO FORM:

/s/ Fredrick J. Farrer
Fredrick J. Farrer (P25361)
Attorney for Plaintiffs

/s/ Paul L. Nelson
Paul L. Nelson (P33605)
Attorney for Defendant G & G

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

* * * * *

HAROLD MANN and JEAN MANN,

Plaintiffs,

vs.

HONORABLE
ROBERT HOLMES BELL
File No. K84-71 CA4

G & G MANUFACTURING, INC.,

a Nebraska Corporation,

Defendant

JAMES THOMAS SLOAN, JR. (P20583)

Attorney for Plaintiffs

MARK H. VERWYS (P23803)

Attorney for Defendant G & G Mfg.

MOTION FOR VOLUNTARY DISMISSAL

NOW COME the Plaintiffs, Harold Mann and Jean Mann, by and through their attorneys, Sloan, Benefiel, Farrer, Newton & Glista, and hereby move this Honorable Court for an Order of Voluntary Dismissal pursuant to F.R.C.P. 41(a)(2) with the following suggested terms and conditions:

1. That the dismissal be with prejudice;
2. That nominal costs in the neighborhood of \$500 be taxes.

This Motion is supported by the accompanying brief.

WHEREFORE, Plaintiff requests that this Court voluntarily dismiss this action with prejudice and with nominal costs taxes.

Dated: December 29, 1987

SLOAN, BENEFIEL, FARRER,
NEWTON & GLISTA
By: /s/ Gary C. Newton
Gary C. Newton

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HAROLD MANN and JEAN MANN,
Plaintiffs,

Hon. Robert Holmes Bell

vs.

Case No. K84-71 CA4

G & G MANUFACTURING, INC.,
a Nebraska Corporation,
Defendant

DEFENDANT G & G
MANUFACTURING'S
RESPONSE TO
PLAINTIFFS' MOTION
FOR VOLUNTARY
DISMISSAL

James Thomas Sloan, Jr. (P20583)
Fredrick J. Farrer

Mark H. Verwys (P23803)
Paul L. Nelson (P33605
TOLLEY, FISHER & VERWYS
5650 Foremost Drive, S.E.
Grand Rapids, MI 49506-7081
(616) 942-8090

As this Court is aware, it is defendant's position that plaintiffs and their attorneys knew, or reasonably should have known, before adding G & G as a defendant, that G & G had no liability for the injury suffered by Harold Mann. Nothing during the course of discovery has improved plaintiffs' claim. In recognition of this situation, plaintiffs have asked the Court to voluntarily dismiss this lawsuit. Plaintiffs' motion for voluntary dismissal, however, does not acknowledge the fact that G & G has been forced to expend in excess of \$35,000.00 defending against a claim which should not have been filed in the first place.

Pursuant to Rule 41(a)(2), Fed. R. Civ. P., a motion for voluntary dismissal shall not be granted except "upon such terms and conditions as the Court deems proper." G & G does not object to this matter being dismissed, but does object to any dismissal conditioned upon an award of only \$500 in costs.

Counsel for G & G currently is drafting, and will be filing shortly, a motion seeking imposition of sanctions and costs under Rule 11, Fed. R. Civ. P., and W.D. Mich. R. 42. G & G wishes to place the Court and plaintiffs on notice that this motion will be filed and that G & G does not intend to waive any claim to the sanctions and/or costs by not objecting to the Court voluntarily dismissing this action.

TOLLEY, FISHER & VERWYS, P.C.
Attorneys for Defendant

Dated: January 8, 1988

By: /s/ Mark H. Verwys

Mark H. Verwys P23803)

Business Address:

5650 Foremost Drive, S.E.

Grand Rapids, MI 49506-7081

Telephone: (616) 942-8090

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

HAROLD MANN and JEAN MANN,

Plaintiffs;

Hon. Robert Holmes Bell

vs.

File No. K84-71 CA4

HUTCHINSON DIVISION, LEAR
SIEGLER, INC., a Delaware
Corporation, and G & G MANUFACTURING,
Defendants.

**ORDER GRANTING PLAINTIFFS' MOTION FOR
VOLUNTARY DISMISSAL**

At a session of said Court held in said
District in the City of Grand Rapids, Michigan
this 5 day of February, 1988.

PRESENT:

HONORABLE ROBERT HOLMES BELL,
United States District Judge

THE PLAINTIFFS, Harold Mann and Jean Mann, having filed their Motion for Voluntary Dismissal of this matter, the Motion having come on for hearing before this Court on January 12, 1988, at which time oral arguments were heard from counsel for the Plaintiffs and counsel for the Defendant, this Court having reviewed the file and the briefs in support of said motion; and the Court otherwise being fully advised in the premises;

IT IS HEREBY ORDERED that Plaintiffs' motion for voluntary dismissal with prejudice is granted. Any costs to be awarded to either party shall be determined at a later date.

/s/ Robert Holmes Bell
Honorable Robert Holmes Bell

APPROVED:

Fredrick J. Farrer
Attorney for Plaintiffs

/s/ Mark H. Verwys
Mark H. Verwys
Attorney for Defendants

Certified as a True Copy
C. Duke Hynek, Clerk

By /s/
Deputy Clerk
U. S. District Court
Western District of Michigan
Date 2-5-88

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HAROLD MANN and JEAN MANN,
Plaintiffs,

vs.

G & G MANUFACTURING, INC.,
a Nebraska Corporation,
Defendant

Hon. Robert Holmes Bell

Case No. K84-71 CA4

DEFENDANT G & G MANU-
FACTURING'S MOTION
FOR IMPOSITION OF
COSTS AND SANCTIONS

James Thomas Sloan, Jr. (P20583)
Fredrick J. Farrer (P25361)
Attorneys for Plaintiffs

Mark H. Verwys (P23803)
Paul L. Nelson (P33605)
Attorneys for G & G Manufacturing
5650 Foremost Drive, S.E.
Grand Rapids, MI 49506-7081
(616) 942-8090

Defendant G & G Manufacturing, Inc. (hereinafter "G & G"), by its attorneys Tolley, Fisher & Verwys, P.C., pursuant to Rule 11, Fed. R. Civ. P., move this Court for entry of an Order imposing costs and other sanctions on plaintiffs and their attorneys, jointly and several, and states as follows:

1. This matter arises out of injuries suffered by Harold Mann on November 9, 1982. Mr. Mann's clothing became entangled in the power takeoff (PTO) shaft on a grain auger he was operating on his farm. This led to his suffering injuries to his left leg and hip and to his right leg.
2. The Mann grain auger, but not the PTO shaft, had been

manufactured by the Hutchinson Division of Lear Siegler, Inc. (hereinafter "Hutchinson"). On or about February 27, 1984, plaintiffs filed this action against Hutchinson alone seeking damages from Hutchinson under products liability theories.

3. Prior to filing suit, plaintiffs' counsel had conducted an investigation into the circumstances surrounding Mr. Mann's injuries. In May and June, 1983, plaintiffs' counsel took statements from Denny Mann (plaintiffs' son) (Attachment 1), Raymond Stutzman (the previous owner of the auger) (Attachment 2), Robert Brewer (Chief of Police of the Village of Constantine who took photographs of the accident scene shortly after the accident) (Attachment 3) and Joseph Kline (a farm employee of the plaintiff) (Attachment 4). These statements established two facts, later central to G & G's defense;

(a) Denny Mann's statement (pp. 5-6) indicated that the PTO shaft had been partially uncovered, and thus effectively unguarded, during the entire period of time it was owned by plaintiffs. This was corroborated by Mr. Stutzman, who stated that he had purchased the auger and that it did not have a complete guard on its when he owned it (pp. 2-3).

(b) Both plaintiffs' counsel and Chief Brewer noticed a sharp projection on the uncovered metal portion of the PTO shaft where Mr. Mann's clothing appeared to have been caught (Denny Mann, p. 38; Brewer, p. 3-4). Chief Brewer later submitted an affidavit confirming this initial observation (Attachment 5).

4. During discovery, Hutchinson answered plaintiffs' interrogatories and indicated on one occasion that the subject PTO shaft had not been supplied by Hutchinson with the grain auger and, on another occasion, that G & G manufactured all PTO shafts supplied with Hutchinson augers. On April 8, 1985, Hutchinson employees Dwight Benninga and Mark Oliphant were deposed. They explained why the PTO shaft was not a G & G shaft and gave specific reasons for reaching that conclusion.

5. Hutchinson took Harold Mann's deposition on March 28, 1985. During his deposition, Mr. Mann gave a significant amount of testimony which showed the weakness of his claim. Mr. Mann testified that he had a lot of experience operating farm machinery (p. 6). He also testified that he knew why farm machinery was guarded and that it was a good safe practice to keep loose clothing away from moving parts (p. 8). Mr. Mann also testified that he was aware that half of the guard assembly on the shaft was missing, that he knew that the entire shaft was supposed to be

guarded, that he recognized that the auger was less safe without a guard, and that his clothing could get caught on the shaft (pp. 9-13). Finally, Mr. Mann testified that had the entire shaft been guarded, the accident would have been less likely to occur and perhaps would not have happened at all (p. 22).

6. Notwithstanding all of this information showing that the PTO shaft was not made by G & G, that Mr. Mann's initial point of contact with the shaft was the projection on the uncovered end of the shaft, and that Mr. Mann fully appreciated the risks inherent in operating an unguarded PTO shaft, plaintiffs filed an amended compliant on or about June 14, 1985 adding G & G as a defendant. G & G as apparently added because its initials appeared on the partial guard remnant which loosely covered the upper half of the subject PTO shaft. The claims against G & G mirrored the claims made against Hutchinson and were based on no more information than plaintiffs and their counsel had when they filed the suit originally, except that they knew this PTO shaft was not manufactured by G & G.

7. Plaintiffs served the summons and amended complaint on G & G on or about September 5, 1985.

8. G & G filed an answer on or about October 22, 1985. On November 14, 1985, plaintiffs noticed the deposition of G & G and demanded that G & G designate persons to testify about six very broad areas, most unrelated to the subject PTO shaft and partial guard remnant, and also that G & G produce a very large number of documents. The deposition was noticed for Omaha, Nebraska on December 17, 1985. The notice was accompanied by several photocopies which purported to show the subject PTO shaft but which showed virtually no detail.

9. G & G's counsel sent letters to plaintiffs' counsel on November 18, 1985 and December 11, 1985 protesting the deposition before G & G personnel had an opportunity to inspect the auger, or at least had an opportunity to view clear photographs of the PTO shaft. (Attachments 6 and 7, respectively) When plaintiffs' counsel refused on two occasions to provide G & G's counsel with the photographs themselves or reprints of them, G & G's counsel made arrangements to obtain reprints, on an expedited basis and for an increased price, from plaintiffs' counsels' photographer. These photographs were sent by Federal Express to G & G, where G & G personnel reviewed them and reached a preliminary conclusion they did not depict a G & G PTO shaft. When G & G's

counsel refused to produce any representative of G & G before having an opportunity to inspect the PTO shaft, plaintiffs' counsel finally relented and agreed to postpone the depositions until after such an inspection.

13. James Herbert, G & G's product safety representative, traveled from Omaha to Constantine, Michigan, to inspect the auger on January 21, 1986. Based on his inspection, Mr. Herbert concluded that the subject PTO shaft was not manufactured by G & G but had been "cannibalized," or assembled from parts from several different PTO shafts. During his visit, Mr. Herbert openly discussed his conclusions and the reasons for them with plaintiffs' counsel. In fact, G & G's counsel offered to make Mr. Herbert available for an immediate deposition in Michigan on that day. Plaintiffs' counsel rejected the offer and insisted that the deposition be held in Omaha.

11. On January 22, 1986, G & G's counsel sent a letter to plaintiffs' counsel in an attempt to avoid the unnecessary expense of traveling to Omaha (Attachment 8). G & G's counsel clearly explained Mr. Herbert's position and offered to provide plaintiffs with a sworn affidavit reflecting Mr. Herger's anticipated testimony. G & G's counsel also informed plaintiffs' counsel that should they persist in their desire to force a useless trip to Omaha, examination of G & G witnesses would be limited strictly to the issue of whether G & G designed, manufactured or distributed the subject PTO shaft and that G & G would only produce documents relating to those issues. In addition, the letter warned plaintiffs' counsel of G & G's intention to seek sanctions under Rule 11.

12. In spite of this letter, plaintiffs' counsel demanded and took the deposition in Omaha. Both Mr. Herbert and Wayne Eipperle, a G & G employee, testified, as expected, that the subject PTO shaft had not been designed, manufactured or distributed by G & G. They reiterated the detailed reasons given by Mr. Herbert in Constantine, Michigan for reaching that conclusion. G & G's counsel instructed Mr. Herbert and Mr. Eipperle not to answer questions beyond those relating to design, manufacture and distribution, and similarly limited production of documents.

13. Plaintiffs later filed a motion to compel discovery which sought to expand the scope of discovery beyond the limits set by G & G; i.e., beyond the issue of whether G & G designed, manufactured or distributed the subject PTO shaft. A hearing on that motion was held before Judge Karr on April 14, 1986. At the hearing, Judge Karr denied plaintiffs' motion to

compel and limited discovery to the whether the PTO shaft was manufactured by G & G. In so ruling, Judge Karr stated:

Just last week, I got an opinion from Judge Enslen in which he assessed a \$5,000 cost against an attorney who had a claim that was at best very questionable, and he pursued it through the discovery process and imposed burdensome costs on the parties involved, and Judge Enslen held that under these circumstances, where an attorney pursues a claim that he knows has no value, he's going to do something about it, and he assessed \$5,000 against this particular attorney.

I'm not saying this is the case here, but it seems to me that it's important that both of you know right off the bat here whether this part is manufactured by G & G. Now Mr. Nelson has obtained, as I say, this fairly extensive and well documented affidavit from Mr. Herbert, indicating that it's not, but that doesn't answer it.

I think you ought to have the opportunity to show that Mr. Herbert doesn't now what he's talking about. So what I want to do now is limit the discovery initially to questions along that line. I hope that can be done. I want you to try it, and if it can't be done, I suppose you will both be back here, but that's my ruling today.

Transcript of April 14, 1986 hearing (Attachment 0), p. 3. Not only did Judge Karr rule in G & G's favor, he pointed out that there appeared to be the potential for sanctions against plaintiffs. When counsel could not agree on the proper form of the Order, Judge Karr himself issued an Order on May 12, 1986 (Attachment 10).

14. Plaintiffs appealed Judge Karr's Order and on October 15, 1986 a hearing was held before Judge Gibson on that appeal. Judge Gibson affirmed Judge Karr's Order and indicated that plaintiffs' counsel "should confine its discovery and requests to the manufacture of the shaft. . ." Transcript of October 15, 1986 hearing (Attachment 11), p. 3.

15. On or about December 16, 1986, plaintiff noticed the depositions of four of G & G's officers and/or employees. The depositions were noticed for Omaha, Nebraska, on January 19, 1987, but later rescheduled to February 11 and 13, 1987. On January 2, 1987, G & G's counsel sent a letter to plaintiffs' counsel objecting to the depositions as an unnecessary

expense. The letter again told plaintiffs' counsel that G & G intended to seek sanctions (Attachment 12).

16. On January 15, 1987, Judge Brenneman held a hearing on Hutchinson's motion for protection order which sought to prevent plaintiffs from obtaining any additional documents from Hutchinson. In granting Hutchinson's motion, Judge Brenneman stated in part:

[T]he uncontradicted evidence is overwhelming that all of the PTO shafts and guards obtained by [Hutchinson] for this type of auger came from G & G Manufacturing, and that the PTO shaft attached to this particular auger (which was apparently a cannibalized PTO shaft attached by persons unknown) was not a G & G product. (emphasis added)

January 15, 1987 Protective Order (Attachment 13), p. 2.

17. G & G's counsel relied on this Order in a letter to plaintiffs' counsel dated January 20, 1987 and informed plaintiffs' counsel that no additional documents would be produced at the Nebraska depositions in February (Attachment 14).

18. On February 2, 1987, Mr. Mann's deposition was taken by G & G's counsel. Mr. Mann testified, among other things, that if he had followed the advise of his grandfather had given him regarding the safe operation of farm machinery, and advice Mr. Mann had given to his own son, he probably would not have been hurt (pp. 11-12, 17-18, 32-33, 34-35).

19. This case was mediated on February 16, 1987. Both Hutchinson and G & G accepted the mediation award. Plaintiffs rejected as to both defendants.

20. On March 11, 1987, G & G's counsel wrote plaintiffs' counsel a letter to put plaintiffs on notice of G & G's intention to seek mediation sanctions, if appropriate. G & G's counsel estimated expenses from mediation through trial of \$15,000.00 to \$20,000.00 (Attachment 15).

21. On April 9, 1987, Judge Gibson held a hearing on defendants' summary judgment motions. Hutchinson's motion was granted. Although G & G's motion was denied, Judge Gibson specifically suggested the possibility of a directed verdict if plaintiffs' proofs were not sufficient. (Attachment 16).

22. On April 11, 1987, G & G took the deposition of plaintiffs'

primary expert in Waterloo, Iowa. Dr. Buchele opined on the issue of defect, that G & G's partial guard remnant had not "lasted long enough" (p. 63). Dr. Buchele also accused Mr. Mann of lying in his deposition testimony (p. 67). Plaintiffs then deposed G & G's expert Dale Gumz, who carefully and cogently explained why Mr. Mann had no one to blame for his injury but himself.

23. On April 23, 1987, G & G's counsel wrote once again to plaintiffs' counsel to reaffirm G & G's intention to seek the imposition of sanctions based on plaintiffs having filed and maintained a groundless lawsuit (Attachment 17).

24. The next day, April 24, 1987, plaintiffs filed a document entitled "Notice of Withdrawal of Mediation Rejection" purporting to withdraw their rejection, and thereby accept, the two-month old mediation award. G & G objected to this obvious attempt to avoid the imposition of mediation sanctions and filed a motion to strike the notice. By Order dated June 24, 1987, Judge Brenneman granted G & G's motion to strike plaintiffs' notice of withdrawal.

25. On December 4, 1987, plaintiffs took the deposition of G & G's other expert, William Field in Lafayette, Indiana. Dr. Field, generally recognized as the most knowledgeable expert in the field of farm equipment injury investigation, confirmed each aspect of Mr. Gumz's testimony.

26. A final pretrial conference was held by Judge Bell on December 10, 1987. At the conference, G & G's counsel once again informed plaintiffs' counsel of G & G's continued intention to seek sanctions. This was reiterated in a letter sent by G & G's counsel on December 22, 1987 informing plaintiffs' counsel that G & G would seek reimbursement of its costs which were estimated to be \$37,000.00 (Attachment 18).

27. On December 30, 1987, less than three weeks before the January 19, 1988 trial date, plaintiffs filed a motion for voluntary dismissal, conditioned upon assessment of only \$500.00 costs. G & G did not object to voluntary dismissal, but did object to an award of only \$500.00.

28. At a hearing held on January 12, 1988, Judge Bell granted plaintiffs' motion for voluntary dismissal but indicated he would determine the amount of costs to be assessed against plaintiffs, and/or their attorneys, at a later date. The order of voluntary dismissal was entered on February 5, 1988 (Attachment 19).

29. The actions of plaintiffs and their counsel were unreasonable

under the circumstances and caused G & G and its insurer, Sentry Insurance a Mutual Company (hereinafter "Sentry"), to incur attorney fees and expenses of \$40,487.61.

30. G & G and Sentry are entitled to reimbursement of the attorney fees and expenses incurred due to the reasonable and baseless actions of plaintiffs and their counsel in joining G & G as a defendant and continuing to pursue this action when they knew, or reasonably should have known, that G & G was not liable for the injuries suffered by Mr. Mann.

WHEREFORE, defendant G & G Manufacturing Company and Sentry Insurance a Mutual Company respectfully request that an Order enter requiring plaintiffs and their attorneys, jointly and severally, to reimburse G & G and Sentry for their attorney fees and expenses, totalling \$40,487.61, incurred in defending this action. This motion is based on the records and pleadings on file in this matter, on the Memorandum of Law and Affidavits filed contemporaneously herewith, and on the attached exhibits and chronology.

Respectfully submitted,
TOLLEY, FISHER & VERWYS, P.C.
Attorneys for Defendant
G & G Manufacturing Company

Dated: February 19, 1988

By: /s/ Mark H. Verwys
Mark H. Verwys (P23803)

By: /s/ Paul L. Nelson
Paul L. Nelson (P33605)

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5650 Foremost Drive, S.E.
Grand Rapids, MI 49506-7081
Telephone: (616) 942-8090

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HAROLD MANN and JEAN MANN, Hon. Robert Holmes Bell
Plaintiffs,

vs.

G & G MANUFACTURING, INC.,
a Nebraska Corporation,
Defendants.

Case No. K84-71-CA4

DEFENDANT G & G
MANUFACTUREING
MEMORANDUM OF LAW
IN SUPPORT OF MOTION
FOR IMPOSITION OF
COSTS AND SANCTIONS
[EXCERPTS]

James Thomas Sloan, Jr. (P20583)
Frederick J. Farrer (P25361)
Attorneys for Plaintiffs

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A. G & G IS ENTITLED TO AN AWARD OF SANCTIONS

Rule 11, Fed. R. Civ. P., originally was adopted to allow a court to impose "disciplinary sanctions to check abuses in the signing of pleadings." 1983 Amendment to Fed. R. Civ. P. 11 advisory committee note (hereinafter "ACN"). The Rule was amended in 1983 with the intent "to reduce the reluctance of courts to impose sanctions...by emphasizing

the responsibilities of the attorney and reinforcing those obligations by the imposition of sanctions." *Id.* The 1983 amendment stressed "the need for some prefiling inquiry into both the facts and the law to satisfy the affirmative duty imposed by the rule." *Id.* (emphasis added).

* * *

voluntarily does not effect G & G's entitlement to an award of sanctions.

In Szabo Food Service, Inc. v. Canteen Corp., 823 F.2d 1073 (7th Cir. 1987), the Seventh Circuit discussed in detail the relationship between voluntary dismissal and the imposition of Rule 11 sanctions. After discussing voluntary dismissal and its effect on a court's inability to award attorney fees under statutes such as 42 U.S.C. Section 1988 (because there is no "prevailing party" when voluntary dismissal is allowed), the court indicated that Rule 11 is different, stating:

An award of fees under Rule 11 is more like a sanction for contempt of court than like a disposition on the merits or even an award of costs. An award under Rule 11 is a "sanction" for violating a rule of court. The obligation to answer for one's act accompanies the act; a lawyer cannot absolve himself of responsibility by dismissing his clients suit.

823 F.2d at 1079. The fact that the instant plaintiffs eventually voluntarily dismissed their complaint does not change the fact that the action should not have been filed in the first place and that the action should have been dismissed long ago. This dismissal does not absolve plaintiffs and their attorney of responsibility for the costs incurred during the twenty-seven months this lawsuit was pending against G & G.

The attorney fees and expenses incurred by G & G and its insurer were incurred between the time plaintiffs served G & G with a summons and amended complaint on September 5, 1985 and the filing of the motion for voluntary dismissal on December 30, 1987. Rule 11 was violated when plaintiffs filed the initial complaint on February 28, 1984 after having more than fifteen months after the accident to investigate, when plaintiffs

served G & G after having an additional 19 months for discovery (February 18, 1984 - September 5, 1985), and when plaintiffs continued to pursue G & G from September 15, 1985 through December 30, 1987, even though the evidence clearly established that it was not a G & G shaft, that the shaft and partial guard remnant on the machine had been cannibalized and that Mr. Mann was aware of and fully appreciated all risks attendant to operating an unguarded PTO shaft yet operated the grain auger in spite of his knowledge. During this time period, numerous pleadings and papers were signed by plaintiffs' counsel. Multiple Rule 11 violations occurred and sanctions must be imposed. See Albright v. Upjohn Co., 788 F.2d 1217, 1222 (6th Cir. 1986).

C. G & G OR ITS INSURER REASONABLY INCURRED COSTS AND FEES OF ALMOST \$40,487.61 DEFENDING THIS ACTION

As the affidavit of Mark H. Verwys (Attachment 22) indicates, G & G's insurer, Sentry Insurance a Mutual Company (hereinafter "Sentry") was billed and paid \$34,327.55 in attorneys fees and expenses in defending this action. Sentry also paid directly expert witness fees and costs in the amount of \$3,627.56. The affidavit of Craig Nolan (Attachment 23) indicates that the hourly rates charged by the firm of Tolley, Fisher & Verwys, P.C., in this matter were reasonable and were within the range of fees charged in this area for this type of defense litigation by counsel of Mr. Verwys' training and experience, and that of other attorneys who aided him. The ...

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

HAROLD MANN and JEAN MANN,
Plaintiffs,

vs.

File No. K84-71 CA4

HUTCHINSON DIVISION, LEAR
SIEGLER, INC., a Delaware Corp-
oration, and G&G MANUFACTURING,
INC., a Nebraska Corporation,
Defendants

JAMES THOMAS SLOAN, JR. (P20583)
Attorney for Plaintiffs

ROBERT C. MABBITT, JR. (P24844)
Attorney for Defendant

MARK H. VERWYS (P23803)
Attorney for Defendant G&G Mfg.

PLAINTIFF'S BRIEF IN OPPOSITION
TO DEFENDANT'S RULE 11 MOTION

Defendant seeks Rule 11 sanctions against Plaintiff claiming at pp. 3-4 of its brief that:

"Plaintiffs had no basis for adding G&G as a defendant. The discovery conducted by plaintiffs prior to filing the amended complaint established two facts: (1) G&G manufactured and supplied all PTO shafts supplied with Hutchinson augers; (2) The subject PTO shaft was not a G&G shaft. Plaintiffs nevertheless chose to put G&G to the expense of having to retain an attorney and defend against these groundless claims."

Later (at p. 15) Defendant charges:

"Plaintiff had a very weak case to begin with, as their counsel's initial investigation and subsequent consultation with experts should have pointed out. During discovery, both before and after G&G was added as a defendant, the case only got weaker."

In this brief, Plaintiff will show that Defendant G&G's claim that the action against its was "groundless" and "weak" and "getting weaker" is untrue and that Rule 11 sanctions should not be imposed.

Plaintiff was injured November 9, 1982, when he got caught in an auger shaft. The plaintiff purchased the auger used and the auger plainly was labeled a Hutchinson auger on the housing. Suit was commenced Initially against Hutchinson on or about February 27, 1984. An amended complaint dated June 14, 1985 was filed naming Defendant G&G (movant in this Rule 11 motion) as a party. Allegations were made that G&G manufactured the shaft and the guard and that defects in both contributed to Plaintiffs injuries.

Defendants Hutchinson and G&G throughout the litigation claimed that the deposition of Larry Slabaugh (Exh. A) clearly shows that the subject auger was "cannibalized" in early 1080 when FROM auger that fell in a windstorm in late 1979. Mr. Slabaugh's deposition does indeed show that he fixed an auger in February 1980. Included in that repair was putting on a Hutchinson housing. It is this repaired auger that all parties believed was the subject auger. Interrogatories directed to Hutchinson show that photographs of the auger Plaintiff was injured on "appear to show an auger manufactured by Hutchinson," and that it, the auger, was manufactured April 18, 1980. (Defendant's [Hutchinson] Answers to

Supplemental Interrogatories, Exh. B). In those interrogatories, Hutchinson also claimed that the drive shaft assembly was not furnished by Hutchinson.

Second Supplemental Interrogatories answers April 18, 1985 (Exh. C) showed that G&G manufactured the only shafts used in the Hutchinson auger. Hutchinson again stated that the shaft in the subject machine was different than the ones furnished by Hutchinson but that it did now know who manufactured it.

Larry Slabaugh's deposition was taken May 6, 1985. He is president of Hochstetler Grain Equipment in Indiana. It sold Hutchinson and Mayrath augers. Mr. Slabaugh was shown photographs of the subject machine. He was asked the following at pp. 20-21:

Q." ...are you able to tell me whether or not that PTO shaft reflected in this picture is the type produced and sold by Hutchinson?

A. It's hard to tell. It looks like the type, but it's hard to tell. It's in pieces.

Q. Now, to your knowledge, did the PTO shaft furnished by Hutchinson separate?

A. Yes.

Q. Was there ever, in fact, to your knowledge, a pin that would stop the PTO shaft from separating?

A. Not to my knowledge.

Q. Would you look at Number 10, if you would, please, Mr. Slabaugh, and tell me if you can identify it as the type of universal joint used by Hutchinson?

A. It's hard to tell, but all PTO shafts look about the same, I guess. It looks like one of the same type."

And at pp. 23-24:

Q. "Can you look at Number 9, MORGAN, and describe that as

to whether or not in your opinion that particular PTO shaft was of the type furnished by Hutchinson?

A. It's a little hard to tell, but it appears to have been. It's all broken up, so you are not sure.

Q. Now, in connection with that picture, as I understand it, it is claimed by Hutchinson that they had a pin in the PTO shaft which kept the shaft from separating; are you aware of such a pin?

A. No, I am not."

And at pp. 38-39:

Q. "Mr. Benninga states the shafts provided by Hutchinson have in them a pin so that when the shaft is pulled to its furthest or largest telescope length that the two parts can't just, you know, pull apart and come apart, so there is a pin in there to keep them from doing that. Now, you have already stated that you are not familiar with that pin mechanism; is that right?"

A. That's right.

Q. If Mr. Benninga said there was one in there, one supplied by Hutchinson, would you dispute that with him or argue with him about that?

A. I would have a tendency to, because I own a Hutchinson auger myself, and mines does pull apart."

Thus, in May of 1985, it appeared that the subject auger looked like Hutchinson auger, was labeled a Hutchinson auger, was composed of shafts which appeared to be furnished by Hutchinson, and although, Hutchinson denied the shafts were theirs, there was testimony which indicated that the shafts were Hutchinson's, and the answers given by Hutchinson explaining why the shafts were not furnished by Hutchinson were apparently not credible. There being evidence showing that the subject Hutchinson auger was composed of shafts furnished by Hutchinson and that the only shafts supplied by Hutchinson were G&G shafts, the complaint was amended to add G&G as a party just a few months before

the statue of limitations expired. (The allegations regarding the guard was made against G&G because the guard itself was marked).

Discovery continued and the employees of Defendant G&G testified that the auger shaft was a Rockwell Standard and the PTO shaft was a Rexnord. Plaintiff was unable to obtain any documentary evidence to support the Defendant's self-serving testimony.

Both Defendants moved for Summary Judgment. Defendant G&G's Motion, Brief, Supplemental Brief, Reply Memorandum and Second Supplemental Brief are attached as Exh. D). Defendant G&G claimed it did not make the shafts, that the plastic guard had been modified, that there was no duty to warn against open and obvious dangers, and that the sole cause of Plaintiff's injuries was his own negligence. Plaintiff submitted his initial brief in April, 1986 and admitted that he cannot show that G&G had anything to do with the manufacture of the drive shaft, (Exh. E). In March, 1987, Plaintiff filed a Supplemental Brief (Exh. F).

Mediation was held before the Motions for Summary Judgment was decided. At mediation Plaintiff again stated he was unable to show it was a G&G shaft and that the cause of action then related to the G&G guard (Mediation Summary, Exh. G., p. 7). The mediators awarded \$0 as to Hutchinson and \$35,000 against G&G. (Considering the degree of comparative negligence likely to be assessed, it is clear the mediators felt there was substantial merit to Plaintiff's cause of action).

The hearing on the Motions for Summary Judgment was held in April, 1987. Hutchinson's motion was granted. G&G's motion was denied.

As to the guard, Plaintiff had three experts who had complaints about the guard.

Excerpts of testimony of Dr. Paul Trojan, a professor of materials and metallurgical engineering at the University of Michigan is attached as Exh. H (Dr. Trojan's testimony is also pertinent in that he points out that the Defendant's employees were mistaken about the configuration of the Hutchinson shafts. He testified that they could have been Hutchinson supplied shafts although he couldn't tell for certain. (See pp. 13-29). Excerpts of Dr. Lee Nylander's deposition is attached as Exh. I. And excerpts of Dr. Wesley Buchele's deposition is attached as Exh. J. All these depositions show that Plaintiff's theory about the guard had merit.

Plaintiff's claims against G&G were neither frivolous, specious, nor unreasonable. As stated in Indianapolis Colts v. Mayor and City of

Baltimore, 775 F2d 177, 184 (7th Cir., 1985):

"An appeal is frivolous when the result is obvious or when the appellant's argument is wholly without merit."

As earlier stated by that same Court (*Id.*, p. 182):

"... when an award of fees is available only upon the finding that a particular pleading was frivolous or unreasonable, as is required by Rule 11, the fact that judges who have ruled on the merits of that pleading disagree provides significant evidence that the pleading was not frivolous or unreasonable."

In the present case, the merits of facts and legal basis of the action have been decided. This Court found that Plaintiff has a cause of action by denying G&G's motion for summary judgment.

Rule 11 sanctions was thoroughly discussed in *Martinez, Inc. v. H. Landau & Company*, 107 F.R.D. 775 (N.D. Ind., 1985). That Court stated at pp. 777-778:

"The core of Rule 11 is that the signature of the pleading or motion certifies that the pleading is 'well grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.' This certification must be based on knowledge and belief 'formed after a reasonable inquiry.' Thus, Rule 11 sanctions cannot be avoided by a mere subjective belief that the law or facts are a certain way; the 'reasonable inquiry' language makes the test an objective one. *Indianapolis Colts v. Mayor and City of Baltimore*, 775 F.2d 117, 181 (7th Cir. 1985); *Glick v. Koenig*, 766 F.2d 265, 270 (7th Cir. 1985)."

"An unstated assumption of Landau's argument for sanctions is that Rule 11 applies to the parts of a pleading as well as the whole. Here, Landau does not state that the first two grounds of the motion to dismiss were unwarranted by existing law or offered in violation of Rule 11 — indeed, given the pendency of the Sedima and Haroco appeals in the Supreme Court at the time the motion was filed, Landau could not make that claim in good faith. Thus, Landau focuses exclusively on grounds three and four, in effect

arguing that their lack of merit alone justifies Rule 11 Sanctions regardless of the merits of grounds one and two."

"The court believes that Rule 11 was not intended to be a weapon against particular arguments in a motion or pleading, but was designed to address the pleading as a whole. The language quoted above specifically states

that the lawyer's signature certifies that the 'pleading, motion, or other paper' is warranted by existing law, and that sanctions must be imposed if the 'pleading, motion or other paper' is signed in violation of the rule. That language is clearly identifying the entire document, and not merely a part of it. Recent case law under Rule 11 appears to focus on the filing of the entire pleading or motion, as opposed to parts of the document. See, e.g., Indianapolis Colts, at 181-182; Hilgefond v. Peoples Bank, Portland, Indiana, 607 F. Supp. 536 (N.D. Ind. 1985); Cameron v. IRS, 593 F. Supp. 1540 (N.D. Ind. 1984); Dore V. Schultz, 582 F. Supp. 154, 158 (S.D.N.Y., 1984).

It is true that the Advisory Committee Notes state that the purpose of Rule 11 is to 'discourage dilatory and abusive tactics and help to streamline the litigation process by lessening frivolous claims or defenses' and that the Seventh Circuit has recently stated that a lawyer's duty under Rule 11 is to 'limit litigation to contentions 'well grounded in fact and ... warranted by existing law. . . .'" In re: TCI Limited, 769 F.2d 441, 445 (7th Cir., 1985), both of which may seem to indicate that Rule 11 can focus on individual arguments within a pleading or motion. However, the court does not so interpret either these comments or the Rule itself as allowing such an application of the Rule."

"This case is a prime example of the incongruity of interpreting Rule 11 as

applying to individual argument within a motion. Assume for a moment that Landau is correct that grounds three and four of the motion to dismiss are groundless, and assume further that the Supreme Court had adopted the

Sedima interpretation of the federal RICO statute. This court would be bound by the Supreme Court precedent to dismiss the counterclaim, and yet be required (under Landau's interpretation of Rule 11) to issue sanctions for filing a successful motion because two of the four grounds were legally groundless. It is

incomprehensible that the drafters of Rule 11 intended such a result, and this court would not issue sanctions in such a situation."

"A second problem posed by Landau's view of Rule 11 is the effect it would have on the formulation of strategy in a case. An attorney who must worry about the possibility of sanctions for raising a marginal legal issue along with several sound grounds for a motion or pleading will invariably choose to reduce his risk and not raise the issue. Such timidity does disservice both to the client and to the law. The Advisory Committee Notes specifically state that Rule 11 'is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories.' yet an interpretation of Rule 11 which allows for sanctions based on motions containing both good and bad arguments would result in precisely such a chill. The court therefore rejected Landau's interpretation of Rule 11. Thus, a court must look to the pleading or motion as a whole when attempting to determine the propriety of Rule 11 sanctions, as litigants should not be penalized for presenting a potentially meritorious issues or grounds on a motion."

And the Stacey Court concluded at p. 779:

"Courts must be on guard against abusive and dilatory tactics by litigants, but must also prevent Rule 11 proceedings from taking on a life of their own through their use for every motion filed in a case. Landau's desire to apply Rule 11 to individual arguments in motions would spawn litigation as potentially abusive as that which Rule 11 is designed to prevent. This court's reading of Rule 11 as applying to motions as a whole better achieves the balance sought by Rule 11, and guarantees that courts will spend their time deciding the merits of cases and not the collateral issues of Rule 11 disputes.

Plaintiff presented a meritorious case. Plaintiff, and Plaintiffs' counsel, had reason to believe that the shaft and guard were manufactured by G&G. When Plaintiff realized he was unable to prove by a preponderance of the evidence that the shaft was indeed a G&G shaft, that aspect of the case was abandoned. The "shaft" theory was not pursued at Summary

Judgment nor at mediation. The claim regarding the guard had merit — the mediators felt it had merit and the Court ruled it had merit. Defendant's motion to impose Rule 11 sanctions would be appropriately denied.

WHEREFORE, Plaintiffs request that this Honorable Court deny Defendant G&G's motion to impose Rule 11 sanctions.

DATED: March 16, 1988

Respectfully submitted,

/s/ Gary C. Newton

Gary C. Newton

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HAROLD MANN and JEAN MANN,
Plaintiffs,

vs.

File No. K84-71 CA

HUTCHINSON DIVISION, LEAR
SIEGLER, INC.,
Defendant.

/

The deposition of LARRY SLABAUGH

Date: Monday, May 6, 1985

Time: 9:43 o'clock A.M.

Place: Hochstetler Grain Equipment, Inc.
Route 3
Nappanee, Indiana

Called as a witness by the Defendant In accordance with the Federal Rules of Civil Procedure, Rules of the United States District Court for the Western District of Michigan, Southern Division, pursuant to the annexed Notice.

Reported by
Theresa A. Lightner

Q. Are you able by looking at this Exhibit Morgan 2 to tell us whether or not the gearbox that we see in that picture is, in fact, the one that would be attached to the Hutchinson auger?

MR. MABBITT: Which Hutchinson auger, any Hutchinson auger?

MR. SLOAN: Yes.

A. Well, it is attached to this particular auger.

Q. Now, based on the Hutchinson auger, can you state whether or not that type of gearbox is used on the Hutchinson auger?

A. I couldn't say that.

Q. And how about the winch, are you able to tell us whether or not that winch on the left-hand side is, in fact, the type of winch used by Hutchinson?

A. It would appear that way; although, I cannot see much of the winch on this picture.

Q. Let's take a look at Morgan Number 13; are you able to tell me whether or not that PTO shaft reflected in this picture is the type produced and sold by Hutchinson?

MR. MABBITT: Wait a second. The question says: "Produced and sold by Hutchinson," and I think the fact of the case establishes

* * *

they do not produce the PTO shaft.

MR. SLOAN: All right, Go ahead.

A. It's hard to tell. It looks like the type, but it's hard to tell. It's in pieces.

Q. Now, to your knowledge, did the PTO shaft furnished by Hutchinson separate?

A. Yes.

Q. Was there ever, in fact, to your knowledge, a pin that would stop the PTO shaft from separating?

A. Not to my knowledge.

Q. Would you look to Number 10, if you would, please, Mr. Slabaugh, and tell me if you can identify it as the type of universal joint used by Hutchinson?

A. It's hard to tell, but all PTO shafts look about the same, I guess. It looks like one of the same type.

Q. Would you be able to tell whether or not that particular universal joint was a forging or casting construction or was a malleable iron stamping?

A. I really don't know.

Q. Looking at 14 now, what specifically with reference that may or may not be a gearbox, is there a gearbox?

* * *

gearbox and then operates it from there.

Q. By "hopper" you mean the sort of intake area at the bottom of the auger where the grain falls and gets lifted up?

A. Yes. It's a plastic hopper.

Q. You might have gathered from some of Mr. Sloan's questions that he already asked you earlier, Mr. Dwight Benninga of Hutchinson has already been deposed in this case, and just as you are here today, and he has stated that from looking at these photographs he sees portions of this auger which in his opinion would not have been supplied by Hutchinson, and you have been asked about a number of those things by Mr. Sloan. Are you familiar with the fact that the PTO shaft normally supplied by Hutchinson was of a telescoping variety, could move in or out and have some leeway in them so the distance between the gearbox and the auger and the PTO take-off, I guess, on the tractor wasn't so critical, there was some movement in the shaft?

A. Yes, there always is, as far as I know, on all PTO's.

Q. Mr. Benninga states the shafts provided by Hutchinson have in them a pin so that when the shaft is pulled to its furthest or longest telescope length that the two parts can't just, you know, pull apart and come apart, so there is a pin in there to keep them from doing that. Now, you have already stated that you are not familiar with that pin mechanism; is that right?

A. That's right.

Q. If Mr. Benninga said there was one in there, one supplied by Hutchinson, would you dispute that with him or argue with him about

that?

A. I would have a tendency to, because I own a Hutchinson auger myself, and mine does pull apart.

Q. What year is yours?

A. 1982, three, something like that.

Q. Mr. Benninga also stated that the cap or guard down there at this particular portion of the auger is also not like the guard that we have been supplied with as this particular auger pictures in this photograph; do you agree with that?

A. Well, Hutchinson had two different intake guards of which in my testimony I said that this one looked like a guard furnished maybe ten years ago, because it was enclosed at the top where today they are open at the top.

Q. Can you tell from the photograph whether or not the particular guard in the photograph of the

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
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HAROLD MANN and JEAN MANN,

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HUTCHINSON DIVISION, LEAR
SIEGLER, INC., a Delaware
corporation, and G & G
MANUFACTURING, INC., a
Nebraska Corporation,
Defendants.

/

The Deposition of PAUL K. TROJAN, taken pursuant to Notice in
the above-entitled cause at 290 City Center Building, in the City
of Ann Arbor, Michigan on Wednesday, September 10, 1986,
commencing at or about 1:00 p.m., before Christine Lanzel, CSR,
a Notary Public in and for the County of Washtenaw.

APPEARANCES:

SLOAN, BENEFIEL, FARRER,
NEWTON & GLISTA
(By: Mr. Fredrick J. Farrer)
501 Comerica Building
Kalamazoo, Michigan 49007

Appearing on behalf of the Plaintiffs

* * *

to Plaintiff's Fourth Supplemental Interrogatories. There are Defendant Hutchinson's Answers to Plaintiff's Fourth Supplemental Interrogatories directed to Lear dated May 5, 1986, and signed by Mr. Benniga. There is an unsigned set of Defendant Hutchinson's Answers apparently to Plaintiffs' Supplemental Interrogatories. That's all there is in that envelope.

Going back to the set of answers signed on April 8, 1985 by Mr. Benniga, you underlined in the addendum answer 2(c) a number of items. Can you tell me why that was important to you?

A. Yes. From the photographs that were part of I believe an earlier deposition, there was an indication that there should have been a pin stop in the mechanism to prevent the two sections of the shaft from separating and that, this was on the PTO shaft, and also that the U joints that were there did not have the appearance that G & G normally would expect to have on their PTO shaft.

Q. Okay. Keeping in mind that these answers are from Hutchinson and not from G & G, of what pertinence is that to what you were doing? What does that suggest to you, I guess is my question.

A. Well, it was just to point out to me that this was their answer and my question was, was that a valid answer or not.

Q. In what sense? Are you suggesting that they were lying in their answer?

A. Suggesting that I was looking for support for their particular answer.

Q. Okay. Did you look for support to the answer anywhere?

A. Yes.

Q. Where did you look?

A. On some of the catalogs and parts catalogs, instructions and so forth, and also the drawings that were supplied at the end of the answers to the interrogatories.

Q. What did you find out?

A. That there was a discrepancy or at least it was difficult to tell the exact dates in which these particular pines may or may not have existed.

Q. And what does that suggest to you?

A. That since there was — it was within a rather large time frame, that the design had been modified.

Q. Does it tell you anything about whether or not the shaft with which Mr. Mann was injured did or did not come from Hutchinson?

* * *

look to me like they may have been put on before you got them?

A. Yes.

Q. Is it fair to say that any markings on here, if they're in red, are the

only Ones that you made?

A. Red or blue, can't remember what color I might have used.

Q. But you wouldn't have used black or anything like that?

A. No, likely not.

Q. It appears that on a number of these you've written in the years '77, '78 or '79. Why did you do that?

A. It was — it came as sort of a batch and the question was what years they may have modified — there may have been modifications in either the PTO shaft or the shield.

Q. Most of these documents, although stapled together, are folded open to a particular page and then you've put the year or something above. Why did you fold them open on a particular page?

A. One of the questions that had arisen in an earlier deposition, and I can't remember which one it was, it might very well have been Mr. Hergert but I would have to go back and review that, was the year when there may have been in the auger gear box shaft a roll pin that was installed to retain the yoke and the question was, the comment was made that it had never been supplied by G & G, I believe was the comment that was made, a yoke that did not have a hole through it in order to attach the roll pin, and the question was, was that in fact recognized by the parts and installation and so forth by Hutchinson and at what year, if that was not true, that it might have changed where they could have supplied a yoke or at least in the Hutchinson catalog there was a yoke that did not have a hole through the yoke, and the objective, of course, was to see, since there was no hole in the yoke of the PTO shaft in question, as to what year that may have been fabricated.

Q. Have you come to a conclusion or reached the objective in going through these items with regard to that question?

A. It would appear that prior to 1974, that in the Hutchinson manuals, if I sort of broadly catalog them, that their yokes do not show a hole through the PTO shaft yoke prior to 1974.

Q. Their catalogs don't show a hole?

A. Yes; that's right.

Q. I presume you haven't gone out in the field and looked at pre-1974 yokes themselves?

A. No, I have not.

Q. Okay. So what you've done is you reviewed these documents?

A. Yes.

Q. And you're saying that based on your review of the documents prior to 1974, the documents don't show any hole in the yoke?

A. That's correct.

Q. And after that date they do?

A. Yes, and that would somewhat coincide with the 1973 request by Curtis Machine that there be a hole that be placed in the end of the gear box shaft, a question by Hutchinson who in turn Curtis Machine made them, because that would be — it would take a while, of course, obviously before that was installed and so it's the same — within that give a few months here or there, that prior to that it probably did not exist because the request wasn't there by Hutchinson to — so to have a hole through the yoke would not be necessary unless you had a place to put it in the shaft and there was not place to put it in the shaft prior to, that was sometime in 1973.

Q. Now, you've looked at the two sections of the shaft involved in this case; in fact, they're leaning against the wall of the office here, correct?

A. Yes.

Q. Is there a hole in either one of these pieces here?

A. No, there is not.

Q. Would that lead you to the conclusion, then, that it's — Well, what conclusion would that lead you to, I'll ask you?

A. Well, if this in turn was followed, that it was likely that somewhere in the 1974 category or before is where the PTO shaft may have been — was its origination, I guess.

Q. Assuming that whoever made the shaft followed Hutchinson's request to put the hole in, the absence of the hole suggests that this was made for Hutchinson prior to 1974?

A. Yes.

Q. Can you tell by whom or do you have an opinion as to by whom?

A. That is somewhat difficult to say because of that — some of the drawings that appear that are really, well, as an example, if one G & G drawing that we looked at, indicates that they also made besides round shafts, they made square shafts or I'll call them rectangular shafts; they aren't absolutely square. It also — That was the 1978 drawing, I believe. Even though they don't mate, it was still the same similar shaft, I guess I should say, and at the same time, I — if the drawing as presented was really 1978, since there were two people that did this and may have been

modified but there's no notion of revisions, that was the time that the hole was put through in order to retain both the shield and the two pieces of shaft to go together or to hold together, I guess I should say, that G & G would supply shafts or could supply shafts prior to 1978 that may not have had the hole through the shaft itself in order to retain it or through the shield, either, for that matter, and that would suggest that they certainly made something that was similar to that as we see the shaft as it sits there. There are no markings per se that say G & G on the shaft in order to say unequivocally that it was a G & G shaft.

Q. Okay. I guess that gets to the nub question before we get to all the rest of this stuff. So you have no basis, from all of the review that you've done today, to be able to say the shaft that's leaning against the wall, the Mann shaft, if you will, was in fact manufactured, either part, by G & G. You simply cannot say that, as I understand it?

A. No, but I also can't say that it wasn't. That also presumes, which I am not — I did not find in any of the prior depositions, that G & G may have been a sole supplier to Hutchinson. There may have been other suppliers to Hutchinson also that — which of course is —

Q. I understand that, but I don't care about any other suppliers, all I care about is G & G and you cannot tell us today based upon all of the review that you've done that that positively is a G & G shaft; all you can say, as I understand, is that it might have been?

A. Yes; that's correct.

Q. Okay. The next envelope, sir, is postmarked February 28, 1986 out of Kalamazoo. It would appear to contain the depositions of Hergert and Eipperle and some documentation which I think is probably the exhibits, yes, it is, the exhibits to the Eipperle and Hergert depositions. You've reviewed those?

A. Yes.

Q. Did you —

A. Sorry about that.

Q. Let's start with the Hergert deposition. (Whereupon a discussion was had off the record.)

* * *

to chemicals and fertilizer. Why did you highlight that?

A. That they indicated that — it implies that the plastic would be

resistant to chemicals and fertilizer.

Q. Do you know whether the material out of which the Mann remnant was made was in fact resistant to chemicals and fertilizer?

A. Probably was not.

Q. How do you know that?

A. Because the external surface was very sandpaper-like and the term that's used is degraded in whatever environment it was exposed to?

Q. How do you know that that environmental included chemicals and fertilizer?

A. That in turn could have been ultraviolet, too, that might have done that, sunlight. The local environment, which may have included chemicals, fertilizer, gasoline that may have spilled on it, sunlight, whatever, may have caused the surface to degrade.

Q. Were you informed, sir, that that particular remnant apparently had not been in Mr. Mann's possession for more than two or three weeks before his accident?

A. I guess I really didn't know the exact, how long he's had the —

Q. Short period of time. You knew that, I take it?

A. There had been, I believe it was Mr. Stutzman, if I remember correctly, indicated that he had the material and had purchased it I guess at auction I believe in 1979. He in turn kept it for I believe he said two years and then in turn sold it after that or he purchased it as a reconditioned unit to begin with and then two years later —

Q. The auger, you mean?

A. Yes, the auger, and had sold the unit after that, roughly two years later which would have put it in 1981, and the accident happened I believe in 1982 and to my knowledge, somewhere within that '81-82 range is how long that Mr. Mann may have had it but I did not know the precise number of weeks, months or whatever that he may have had it in his possession.

Q. I take it then you don't know what environment the fragment was exposed to during its lifetime?

A. No, I do not.

Q. You don't know when it was manufactured?

A. No, I do not. There's no manufacturing date on it that I could perceive.

Q. Run through, if you would, for me the kinds of things that could cause the surface condition of the material to be in the condition that you found it when you examined it?

A. Oh, it could be chemical in nature and I'll include fertilizer in that sense, it could be also degradation that occurred due to sunlight, it could be abrasion although I doubt that very much because abrasion would be local and not uniform and that was very uniformly, had a very uniform sandpapers surface, and those are basically the things that would — the polymer itself, to whatever it may have been exposed to in I'll call it the environment, degraded on its surface.

Q. Does the surface degradation have anything at all to do with the structural integrity of the product that's formed out of that material?

A. Yes.

Q. What way:

A. In terms of how it may perform in service, you mean?

Q. Yes.

A. Yes, it does for several reasons. First of all, when it degrades, it normally becomes very, I'll call it brittle, friable, you can scratch it off, so to speak, with a sharp knife, and of course you're losing cross section in it which means it's not going to be as strong. More often than not, it also creates a problem in materials that we refer to as fracture toughness. When something become brittle on its surface, it can form a crack and the crack can propagate much more readily than it can if you had something that didn't have a hard brittle surface on it.

Q. Okay. Do you have an opinion as to whether or not the tenite polymer as it was described in materials that you received was or was not an appropriate material to be used to manufacture guards for power take-off shafts?

A. Well, I see nothing in there in terms of tests that were run as to the exposure to the environment that you would have on farm equipment that would indicate that it was either good or bad.

Q. I'm not asking you whether or not you think that anybody, either G & G or Hutchinson, did any tests to find out. I'm asking whether or not you think it was any good?

A. No, it wasn't. It didn't perform the way that it should.

* * *

not I guess is another case in point, but that just sort of suggested that there certainly is a difference between the rotating and the no-rotating guards in terms of accident incidence.

Q. Can we presume that that statement was written in an application for a patent on a non-rotating guard?

A. Oh, yes.

Q. Did you print off the abstracts that you referred to? Where did you see them?

A. I don't think so. There's abstracting services and I can't remember which one or at which time that this might have been done. We even have them at the University. You get on line and you ask for strange things and you get strange answers and this undoubtedly came off of one of those.

Q. But you didn't produce or obtain a hard copy of that?

A. No, I didn't get hard copy of that or of the patents themselves. There are a lot of them out there.

Q. Have you researched any conclusion as to whether this accident would have happened had there been a guard remnant on the shaft at all?

A. Well, certainly the guard played a role. It fractured, it in turn had wedged under it which one of the problems with a partial guard is that it is supported on one end, even if it's against the bearing, well supported on the one end and the other and can obviously flop and in flopping can obviously punch and pinch clothing and whatever and help anchor things. I guess that in the absence of that pinching operation, basically is that you're asking, would that have — would the accident still occurred? I guess I don't know. If I was out there with a bathrobe and I had a strap hanging off the end, it could wrap around something whether there was a guard there or not a guard there in terms of the pinching operation even if it was relatively smooth, so I guess I don't know frankly as to which portion of the clothing, how baggy it may have been that was sort of hanging out there that might have been caught on something other than to say that with a partial guard, it is going to be worse; greater tendency, I guess I should say.

Q. But in this case you don't know that it was. You don't know that that's how the clothing got caught in this case, do you?

A. No. I do know that it was wedged underneath and having been wedged underneath between the PTO and the guard, that in turn suggests that the guard played an important role in helping to hold that together.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HAROLD MANN and JEAN MANN,
Plaintiff,

vs.

File No. K84-71 CA4

HUTCHINSON DIVISION,
LEAR SIEGLER, INC., a Delaware
corporation, and G & G MANUFACTURING
INC., A Nebraska Corporation,
Defendant.

The Discovery deposition of LEE R. NYLANDER, called for examination by the defendant, pursuant to the applicable provisions of the Federal Rules of Civil procedure, and the Rules of the Supreme Court thereof, pertaining to the taking of depositions, taken before TONJA R. JEENINGS, Certified Shorthand Reporter and a notary public within and for the County of Cook and State of Illinois, at Suite 4001, 3424 South State Street, Chicago, Illinois, on the 9th day of December, A.D., 1986 commencing at the hour of 10:00 o'clock a.m.

* * *

A. What I found was that the surface is — Well, without the microscope, I can see that the surface is very rough. When I looked through the microscope, I found that the roughness was not due to abrasion but rather due to severe cracking of the polymer. And, so I took micro photographs of the surface, which I have here.

Q. Okay.

A. Photographs were taken on two different dates. The first set was taken on September 12, 1986. The purpose of the photographs was, one, to document the condition of the remnant prior to doing any testing on it; and two, to show the cracking structure of the surface. I have three

photographs that show a magnified view of the surface with the severe cracking and degradation of the surface.

Q. Based upon your background and training, what causes this kind of a condition that we see in these photographs?

A. Polymer degradation.

Q. What causes polymer degradation?

A. There were several possibilities that were considered at the time when I was looking at those

* * *

A. Yes.

Q. So, in order to take into account minor variations, that's why you change it into foot-pounds-per square inch?

A. Yes.

Q. What did you find out?

A. Okay. What I found out, the bottom line was that the reference — I am sorry —

Q. Remnant.

A. — the remnant had lost between fifty-four and fifty-eight percent of its impact resistance.

Q. And that is summarized in the table that you have there?

A. Yes.

Q. What else did you do in terms of impact?

A. Nothing, that's it.

Q. What are the other documents that you have there?

A. This is the actual data sheets that were generated for the impact testing. That last page is a correction that has to be made on the observed value.

Q. You have some literature there, also.

* * *

permanent and not easily removed to ensure the safe operation of the portable auger. Have you got any opinions on that particular allegation, or has your area of expertise got anything to do with how to design one of these things?

A. I have no opinions on that issue.

Q. All right. It's alleged in designing this guard, G & G was negligent because they used a material known to be subject to environmental and mechanical deterioration and material not suited for the intended uses of the same. Do you have an opinion on that allegation?

A. Yes.

Q. Okay. What is it?

A. Well, the material that was used, it's certainly not suitable for prolonged outdoor exposure.

Q. How long?

A. No one can give you an exact number because it depends on the geographical areas, any give year of the month, solar energy. No one can really give you an exact number on that. It's relative. The use of the stabilizer greatly

UNITED STATES DISTRICT COURT
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HAROLD MANN and JEAN MANN,
Plaintiffs,

vs.

File No. K84-71 CA4

HUTCHINSON DIVISION, LEAR
SIEGLER, INC., a Delaware
corporation, and G & G
MANUFACTURING, INC., a
Nebraska Corporation,

Defendants.

DEPOSITION OF WESLEY BUCHELE, taken on behalf of the Defendant G & G Manufacturing, Inc., on April 11, 1987, commencing at 9:30 a.m., at the offices of Van Wyngarden & Abrahamson, 800 First National Building, Waterloo, Iowa, before Ronald Abrahamson, Certified Shorthand Reporter of Iowa, pursuant to stipulation.

APPEARANCES:

MR. FREDRICK J. FARRER, of the firm of Sloan, Benefiel, Farrer, Newton & Glista, 501 Comerica Building, 151 S. Rose Street, Kalamazoo, Michigan 49007; Counsel for Plaintiffs.

MR. MARK H. VERWYS, of the firm of Tolley, Fisher & Verwys, P.C., 5650 Foremost Drive, S.E., Grand Rapids, Michigan 49506-7081; Counsel for Defendant G & G Manufacturing, Inc.

Rockwell Standard marking on the implement end.

Q. Does that led you — it's been a long flight, sorry. Does lead you to any conclusions about who might have manufactured or assembled that shaft?

A. Well, I did look into the various catalogs that G & G had put out over the years. And for a number of years they did market a Rockwell Standard guard. I mean a universal joint. In other words, they bought them from Rockwell Standard and welded on it, and then assembled it into their shafts.

Q. All right. Let me ask you point blank, is that, in your view, a G & G shaft or not?

A. The implement end?

Q. Either end?

A. Well, all I'm doing is going back in history, and I find that G & G did market a shaft that the universal joint came from Rockwell Standard.

Q. Well, and who else in the industry marketed PTO shafts with Rockwell U-joints?

A. Well, Rockwell did, Rockwell Standard did.

Q. Okay. So now we have got at least one end of this shaft could have come from one of two places, in your view?

A. That's true.

Q. Now, I want to come back to the same question again. Are prepared to tell a jury in court in Grand Rapids in April of 1987, that this is a G & G shaft?

A. I'm willing to follow the paper trail of it, and show that it could be a G & G PTO shaft.

Q. Okay.

A. The implement end.

Q. And you're going to do that on the basis of the fact that it has a Rockwell Standard U-joint?, and that at least at some point in the past G & G used Rockwell Standard U-joints?

A. That's true.

Q. Okay. Are you going to do it on the basis of any other facts that have come to your attention, either your own or what you have been told?

A. That's the basis I am using right now.

Q. I want to know the basis that you are going to use on April 21, ten days from now. Anything else?

A. Well, I think that will be — as far as I know that will be the paper

trail that I will have available to do the job.

Q. Okay. That's all you have available, as I understand it?

A. Yeah.

Q. Is the G & G catalog?

A. That's right.

Q. All right. Based upon your experience and education and training in the field of agricultural implements, that's all you got?

A. That's all I have right now.

Q. All right. How about the other end of the shaft, is that a G & G end?

A. I did not find any paper trail that would show that they had ever marketed a Rexnord. So therefore I would assume that was not a Rexnord — not a G & G.

Q. All right. Let's make an assumption just for the moment that you're correct, although obviously our position is to the contrary, and let's assume that one-half of the shaft that's on the table before us was at some time marketed by G & G. If that's right, then what we have here in this shaft is not a G & G shaft, is it?

A. It's a portion of a G & G shaft.

Q. All right. And it's a portion of somebody else's shaft?

A. Sure.

Q. Which means it's a cobbled up or a jerry-rigged shaft, doesn't it?

A. Yeah, it was just taking two ends of a shaft and mating them together. And they do mate together.

Q. Somebody did?

A. Yeah, somebody did.

Q. Okay. Do you have any idea who?

A. I have no idea.

Q. Okay. Now, if the end that you think might be a G & G end is not a G & G end, somebody else's, then it's still a cobbled up or jerry-rigged shaft, isn't it?

A. Well, I don't know what your definition of jerry-rigged is. It's a shaft, it's a shaft that did the job of the PTO shaft, but it did not have a shield on it that did the job of the shield.

Q. We will talk about the shield in a moment. I would like to stay on the shaft here just a minute.

A. Okay. Well, I put that in to be sure I'm getting the whole answer in there.

Q. The shaft has been assembled or cobbled up by somebody, not a manufacturer, correct?

A. I don't know what your definition of cobbled up is. I'm saying that somebody assembled two portions of shafts together, and the shaft

* * *

A. Well, I didn't find any warning system on them.

Q. Any warning system on it?

A. Yeah, to warn people of its limited life, as to what the operator should do or should not do, to classify the danger, and all these things that should be put on the shaft.

Q. Have you ever seen such a warning on a PTO shaft guard?

A. Oh, sure.

Q. Where did you see it?

A. Oh, Weasler puts it on. Various people put them on.

Q. Where do they put it, on which part of the shaft, the male or the female?

A. They put it on the male.

Q. Why?

A. That's the only thing that's on the outside.

Q. What have you got there?

A. We got the female.

Q. So how can you be critical of G & G for not putting a warning on when nobody else in the industry puts one on that piece?

A. Well —

Q. You're not, are you?

A. Well, if this is the way people are going to use it, then we should put it on the inside, so people will know it and have something to read when the other guard isn't in place.

Q. Even you can't keep a straight face now, can you, Doctor? I think the record should reflect that most of us around the table are chuckling over that remark. If you put any kind of printed warning on the inside, sooner or later it's going to be simply worn off by the telescoping of the mechanism, isn't it, and isn't that why they put it on the male end?

A. Well, I think it should be on the female end. I think it should be on the female end, but what I —

Q. And isn't that where it usually is?

A. The dissertation that I just made was if these things are going to get separated, and so forth, maybe we ought to put it on the male end so that people will be warned to put it back together again.

Q. You have never seen anything like that in the industry, have you, sir?

A. No.

Q. Any other criticisms that you have indicated to us today that the plastic used in this shield, that involved in this accident was not suitable material for PTO shaft shields. Could you tell us the basis of that opinion?

A. The basis of that opinion is that the shield, as we see it here today, has undergone weathering, which has caused it to become brittle. And it's my observation of other shields, as well as this shield, that these shields made of this tenite material break and split and have a relatively short life.

Q. Would you have an opinion as to whether or not users of this specific shield, if you assume that it was fully intact, but in the degraded state as you see most of the surface, would appreciate that that shield would split or be brittle or break?

A. I don't know —

MR. VERWYS: I object, that calls for speculation on the part of the witness. And the hypothetical is incomplete.

Q. You may answer.

A. My opinion is that they would not understand the effect of the deterioration on the shield.

Q. And why are you of that opinion?

A. My opinion is that the shield has undergone deterioration, but the ordinary user would not understand what the deterioration does to the shield in reducing its strength and making it more brittle.

Q. Were there other materials known to the industry in the 1970's, other than this plastic tenite that was used in this shaft, to be used for shields?

A. Yes, there was.

Q. And what other types of materials were used for shielding of PTO shafts?

A. The practice of making shields was to make them out of steel, steel tubing, with a bell housing attached to the tubing on both sides. And then incorporating bearings on the ends of the two guards. And then

during the period of time you're talking about some manufacturers came out with a plastic guard that had a longer life than the orange plastic material.

Q. Do you know the reason for the orange plastic material to become — or how it becomes degraded?

A. The only thing I can testify is what I have read in the depositions.

* * *

Q. You may answer.

A. The shield becomes disassembled when the keeper spring comes out. And it can come out under various conditions, but maybe it is when the bell housing splits and allows the keeper spring to come out, because it's lost its backing to keep it in.

Q. Is there any reason why the tractor end of the shields are off the nylon bearing, or where they are supposed to be, and not the implement end?

MR. VERWYS: Same objection, lack of foundation.

Q. You may answer.

A. Well, of course, the implement end is tied to the implement, and doesn't get the beating around that the other end gets when it's disconnected from the tractor. It may be dropped. Things like that may happen that would cause this keeper spring to flip out. So it looks like, from looking at all these, that the tractor end would have more of that type of activity, because it is loose and it can be laid down on the tongue, or be dropped on the tongue, or whatever, as they take it off.

Q. Now, do you have an opinion, based upon what you know about this case, and based upon your training and experience, whether or not the fact that this plastic was not suitable, was not a suitable material for PTO shafts, if this was a cause to Mr. Mann's injuries?

A. Yes, I do.

Q. And what is your opinion?

A. My opinion is that it led to the condition in which the clothing of Mr. Mann, when he brushed or fell against the shaft, actually caught in the shaft, on the shaft, and caused the accident to take place.

Q. And could you explain for us again how or why you are of that opinion

A. My opinion is that when Mr. Mann fell or brushed against the

shaft, that the shaft end broke, the end of the shield broke, and his clothing caught on the shaft and began being wrapped up by the shaft. And the clothing as it was wrapped up, it actually was being wrapped inside of the shield, and the shield for a while was on the outside of the clothing as it was being wrapped up, and then eventually the clothing was wrapped around the shield.

Q. There was also some mention of a burr on the male end of the subject PTO shaft. And there may be some opinions expressed at trial that that burr was the portion of the shaft that first came into contact with Mr. Mann's clothing. And you have indicated during direct examination or questions posed by Mr. Verwys that you did not feel that that burr was the initial contact point, is that correct?

A. In my analysis it was not, correct, the initial point.

Q. Okay. Now, why are you of that opinion?

A. Well, I looked at the thread that was there, and I didn't see, notice — if the thread had been the initial contact, then it would have been wrapped tight around the shaft, and would have shown a stress condition.

Q. Okay. Now, the thread you're referring to is from a photograph?

A. Yes, sir.

Q. Is this the photograph?

A. Yes, this would be photo 11 of 17 taken by the Constantine Police Department regarding Harold Mann.

Q. Okay.

MR. FARRER: Why don't we have that marked, please.

(Whereupon, the Reporter marked Deposition Exhibit 20 for identification as requested.)

